24-11

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1887.**

No. 1012.

HUGH KELLY, PLAINTIFF IN ERROR,

*vs.*

EDWARD L. HEDDEN, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

**FILED AUGUST 24, 1887.**

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between Hugh Kelly and Edward L. Hedden, a manifest error hath happened, to the great damage of the said Hugh Kelly, as is said and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of August, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH,
*Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.*

Allowed A'g. 18th, 1887.
E. HENRY LACOMBE.

2 [Endorsed:] U. S. circuit court, S. D. of N. Y. Hugh Kelly *vs.* Edward L. Hedden. 10887. Writ of error. C. Stewart Davison, pl'ff's attorney, 56 Wall St., New York. 145 ch. A copy of the within paper has been this day received at this office. Aug. 18, 1887. Stephen A. Walker, U. S. attorney. U. S. circuit court. Filed Aug. 18, 1887. Timothy Griffith, clerk.

UNITED STATES OF AMERICA,
*Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from one to thirty-five, inclusive, contain a true and complete transcript

of the records and proceedings had in said court in the case of Hugh Kelly, plaintiff in error, against Edward L. Hedden, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 22d day of August, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

3 United States Circuit Court for the Southern District of New York.

HUGH KELLY

*against*

EDWARD L. HEDDEN, as Collector of the Port of New York.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New York, this 23rd day of March, in the year one thousand eight hundred and eighty-six.

[L. S.] TIMOTHY GRIFFITH, *Clerk.*

CH'S STEWART DAVISON,
*Plaintiff's Attorney.*

Office and post-office address, 43 Wall St., New York city.

4 [Endorsed:] United States circuit court, southern district of New York. Kelly *vs.* Hedden. Summons. —— ——, plaintiff's attorney.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I hereby certify that on the — day of ——, 18—, at ——, I personally served the within summons on the within-named defendant by showing the same and delivering to and leaving with —— —— — true cop— thereof.

—— ——,
*U. S. Marshal.*
By —— ——, *Deputy.*

5 *Bill of Particulars.*

United States Circuit Court, Southern District of New York.

HUGH KELLY
*vs.*
EDWARD L. HEDDEN, as Collector, &c. } No. 10087.

A bill of particulars of the plaintiff demanded in the above-entitled suit and which is maintained for the recovery of duties erroneously and illegally exacted by the defendant, a collector of customs.

The name of the importer is Hugh Kelly, importing under the name of Hugh Kelly.

The description of the merchandise is—
*a.* 58 hogsheads of molasses.
*b.* 4 barrels of honey.
*c.* 329 hogsheads of molasses.

The place from which imported is—
*a.* Macoris, Dominican Republic.
*b.* Macoris, Dominican Republic.
*c.* Macoris, Dominican Republic.

6 The names of the vessels on which imported are—
*a.* Harry Prescott.
*b.* Harry Prescott.
*c.* Francis E. Hallock.

The dates of the invoice are—
*a.* June 12th, 1885.
*b.* May 11th, 1885.
*c.* July 29th, 1885.

The dates of the entries at the custom-house are—
*a.* July 7th & 8th, 1885.
*b.* July 7th & 8th, 1885.
*c.* August 19th, 1885.

The precise amount of duty claimed to have been exacted in excess are—
*a.* $315.36.
*b.* 35.20.
*c.* 1,771.24.

The dates of payment of said duties are—

| | | |
|---|---|---|
| *a.* July 7th, 1885 | $315 36 | |
| *b.* July 7th, 1885 | 35 20 | |
| | | 350 56 |
| *c.* August 17th, 1885 | 1,771 24 | |
| | | 1,771 24 |

7 The day and year on which protests were filed against the exaction thereof are—
*a.* August 24th, 1885.

*b.* August 24th, 1885.
*c.* September 28th, 1885.

The dates of appeals thereon to the Secretary of the Treasury are—

*a.* August 24th, 1885.
*b.* August 24th, 1885.
*c.* September 28th, 1885.

The dates of decision of such appeals are—

*a.* December 28th, 1885.
*b.* December 28th, 1885.
*c.* December 28th, 1885.

Yours, &c.,

CH. STEWART DAVISON,
*Pl'ff's Att'y, 43 Wall Street, N. Y. City.*

To Stephen A. Walker, Esq., U. S. att'y, U. S. court building, N. Y. city.

8 (Endorsed:) U. S. circuit court, southern district of New York. Hugh Kelly against Edward L. Hedden, as collector, &c. Bill of particulars. Ch's Stewart Davison, attorney for pl'ff, 48 Wall St., New York city.

9 *Complaint.*

United States Circuit Court, Southern District of New York.

HUGH KELLY
*against*
EDWARD L. HEDDEN, as Collector, &c. } No. 10887.

The plaintiff complains and alleges—

First. That the plaintiff is and at all times since the 1st day of December, 1884, has been doing business in the city of New York as an importer of merchandize under his said name of Hugh Kelly, and that the defendant since about the 1st day of July, 1885, has been and is now the collector of the port of New York.

Second. That during the same times the Dominican Republic was an independent sovereignty, between whom and the United States of America there then existed and now exists a treaty duly ratified and proclaimed, and to carry which into operation the necessary laws of Congress were passed, whereby it is, among other things, proclaimed in article IX thereof that "no higher or other duties
10 shall be imposed on the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic * * * than are or shall be payable on the like article being the growth, produce, or manufacture of any other country," and which treaty was signed by the representatives of the respective powers on the 8th day of February, 1867, and the ratification and proclamation whereof and the passing and approval of the necessary laws of Congress to carry which into operation took place shortly thereafter and prior to the times in the third article of this complaint mentioned.

Third. That at that time there then were existing acts of Congress, being valid and operative laws of the United States of America, imposing certain duties on the importation into the United States of certain articles, to wit, sugars and molasses, wheresoever grown, produced, or manufactured, being like articles to the sugars and molasses grown, produced, and manufactured in said Dominican Republic, and then and ever since customarily imported there-
11 from into the United States, and to the molasses mentioned in the bill of particulars in this action, to recover for the illegal assessment of duties whereon this action is brought, and which said laws, though from time to time altered and amended as to the classification of the sugars and molasses and the rates of duty imposed thereby, continues so to exist and be operative as to all sugars and molasses wheresoever produced and manufactured, including those of the Dominican Republic, down to the time in that behalf hereinafter mentioned.

Fourth. That on the 30th day of January, 1875, there was signed by the representatives of the respective powers a certain treaty between the country known as the Hawaiian Islands, being the dominions of his majesty the king of the Hawaiian Islands, and the United States, whereby the United States agreed to admit, and pursuant to which it has admitted and now continues to admit, into the United States sugars, molasses, and syrups the growth, produce, and manufacture of said country free of duty, and which treaty was, on the 3rd day of June, 1875, duly ratified, on the 9th day of Sep-
12 tember, 1876, duly proclaimed, and to carry which into effect the necessary acts or laws of Congress were duly passed and approved on the 15th day of August, 1876, and which said treaty became operative and for all purposes in full force and virtue on the said 9th day of September, 1876, and has so remained and continues ever since as the supreme law of the land, and whereby and by which provision thereof the laws heretofore referred to imposing duties on the importation into the United States of sugars, molasses, and syrups like unto those grown, produced, or manufactured in said Hawaiian Islands were abrogated as to similar articles grown, produced, or manufactured in said Dominican Republic, nor have said laws ever been revived, re-enacted, or restored to operative force as to the same by any enactment, joint resolution, or other legislative measure from such time down to the time of bringing this suit.

Fifth. That heretofore the plaintiff imported at New York
13 certain molasses and honey from the Dominican Republic, being the growth, produce, and manufacture thereof and like articles to those of the Hawaiian Islands, which are admitted free of duty.

Sixth. That the same were duly entered, and claims to exemption from duty were duly made to the defendant.

Seventh. That thereafter the defendant made his decisions as to the rate and amount of duties to be paid on such merchandize and the dutiable costs and charges thereon.

Eighth. That thereafter and within ten days in each case after the ascertainment and liquidation of the duties by the defendant,

the plaintiff, being dissatisfied with the said decisions, gave notice, in writing, to the defendant on said entries, setting forth therein distinctly and specifically the grounds of *their* objections thereto, as appears by a copy thereof annexed, marked "A," and made a part hereof.

Ninth. That, subject to such protests and in order to obtain possession of said goods, the said plaintiffs paid to the defendant the amount so ascertained and liquidated as duties on such mer-
14 chandize, as appears, together with the particulars of the merchandize, time of entry, amounts of duty, times of payment and of protest, times of appeal and of decisions, and all other particulars, in the bill of particulars herein, a copy whereof is hereto annexed and made a part hereof and marked "B," but that such rate and amount of duties was not authorized by law.

Tenth. That within thirty days thereafter in each case, to wit, after such ascertainment and liquidation, the plaintiff duly appealed to the Secretary of the Treasury.

Eleventh. That thereafter the Secretary of the Treasury made his decisions denying such appeals, and plaintiff, within the time limited by law, brought this action to recover such excess of duties exacted, to wit, the whole thereof.

Wherefore the plaintiff prays judgment against the said defendant for the sum of $\$2{,}121\frac{80}{100}$, together with his costs of this action.

CH'S STEWART DAVISON,
*Plaintiff's Attorney.*

15 "A."

NEW YORK, —— —, 188–.

Hon. Edward L. Hedden, collector of customs.

SIR: We hereby protest against the ascertainment and liquidation and your decision as to the rate and amount of the duties to be paid on our entry (in bond), made on the — day of ——, 188–, of —— imported by us in the —— from —— ——, Santo Domingo, and warehoused on that date, entry No. —, bond No. —, and on which duties have been levied to the amount of $\$\frac{——}{100}$, because of a treaty with the Hawaiian Islands and an act of Congress and proclamation of the President relative thereto admitting sugars and molasses the product and manufacture of the Hawaiian Islands free of duty into the ports of the United States after the 9th day of September, 1876, and under which sugars and molasses have been so admitted. We claim that, under treaty stipulations
16 existing with the Republic of Santo Domingo, no higher or other duties are to be imposed on the importation into the United States of any article the produce or manufacture of the Republic of Santo Domingo than are or shall be payable on the like article being the produce or manufacture of any other foreign country, and we further claim that the aforesaid molasses and honey as above imported are the produce and manufacture of the Republic of Santo Domingo and protected by and entitled to all rights and privileges accorded by said treaty with that republic.

Upon these grounds we base our protest and claim that the molasses and honey described in this protest should be admitted into this port free of duty. We have paid the duties demanded, in order to get possession of the goods, and claim to have the same refunded.

Yours very respectfully, —— ——.

17 "B."

*Bill of Particulars.*

United States Circuit Court, Southern District of New York.

HUGH KELLY
*against*
EDWARD L. HEDDEN, as Collector, etc., } No. 10887.

A bill of particulars of the plaintiff demanded in the above-entitled suit and which is maintained for the recovery of duties erroneously and illegally exacted by the defendant, a collector of customs.

The name of the importer is Hugh Kelly, importing under the name of Hugh Kelly.

The description of the merchandize is—
*a.* 58 hogsheads of molasses.
*b.* 4 barrels of honey.
*c.* 327 hogsheads of molasses.

The place from which imported is—
*a.* Macoris, Dominican Republic.
*b.* Macoris, Dominican Republic.
*c.* Macoris, Dominican Republic.

18 The names of the vessels on which imported are—
*a.* Harry Prescott.
*b.* Harry Prescott.
*c.* Francis E. Hallock.

The dates of the invoices are—
*a.* June 12th, 1885.
*b.* May 11th, 1885.
*c.* July 29th, 1885.

The dates of the entries at the custom-house are—
*a.* July 7th, 1885.
*b.* July 7th, 1885.
*c.* August 19th, 1885.

The precise amounts of duty claimed to have been exacted in excess are—
*a.* $315 36.
*b.* 35 20.
*c.* 1,771 24.

The dates of payment of said duties are—
*a.* July 7th, 1885 ---------- $315 36
*b.* July 7th, 1885 ---------- 35 20
$350 56
19 *c.* August 19th, 1885---------- $1,771 24
1,771 24

The day and year on which protests were filed against the exaction thereof are—
*a.* August 24th, 1885.
*b.* August 24th, 1885.
*c.* September 28th, 1885.

The dates of appeal therein to the Secretary of the Treasury are—
*a.* August 24th, 1885.
*b.* August 24th. 1885.
*c.* September 28th, 1885.

The dates of the decision of such appeals are—
*a.* December 28th, 1885.
*b.* December 28th, 1885.
*c.* December 28th, 1885.

Yours, &c.,
CH'S STEWART DAVISON,
*Pl'ff's Att'y, 43 Wall Street, N. Y. City.*

To Stephen A. Walker, Esq., U. S. attorney, U. S. court building, N. Y. city.

20 (Endorsed:) U. S. circuit court. No. 10887. Hugh Kelly, plaintiff, against Edward L. Hedden, as collector, &c., defendant. Complaint. C. Stewart Davison, att'y for pl'ff. (File mark.) U. S. circuit court. Filed 1887.

21 United States Circuit Court, Northern District of New York.

HUGH P. KELLY
*vs.*
EDWARD L. HEDDEN. } 10887.

The defendant above named, by Stephen A. Walker, U. S. attorney, attorney for the defendant in the above-entitled action, demurs to the plaintiff's complaint in the above action—

First. Upon the ground that it does not state facts sufficient to constitute a cause of action against the defendant therein.

Second. Upon the ground that the above-entitled court has no jurisdiction over the cause of action alleged in said complaint against said defendant.

STEPHEN A. WALKER,
*U. S. Attorney, Attorney for Defendant.*

(Endorsed:) U. S. circuit court, southern district of New York. Hugh P. Kelly *versus* Edward L. Hedden. Demurrer.
22 Stephen A. Walker, United States attorney, attorney for defendant. Service of a copy of the within is hereby admitted. New York, Aug. 21, 1886. (S'g'd) Ch's Stewart Davidson, attorney for plaintiff. (File mark.) U. S. circuit —. Filed. Timothy Griffith, clerk.

23 *Opinion. Filed 23rd July*, 1887.

United States Circuit Court for the Southern District of New York.

HUGH KELLY *against* EDWARD L. HEDDEN, Collector, &c.

On demurrer to complaint.

Charles Stewart Davison, for plaintiff; Stephen A. Walker (U. S. att'y), & Thomas Greenwood, ass't U. S. att'y, for defendant.

LACOMBE, *J.*:

The questions raised by the demurrer are the same considered in the cases of Bartram *vs.* Robertson, 15 Fed. Rep., 212, recently affirmed in the Supreme Court; Whitney *vs.* Robertson, 21 Feb. Rep., 566, and Netherclift *vs.* Robertson, 27 Fed. Rep., 737, and for the reason stated in the opinions there delivered the demurrer is sustained.

(S'g'd) E. H. LACOMBE.

(Endorsed:) Circuit court of the United States for the southern district of New York. Hugh Kelly *vs.* Edward L. Hedden, coll'r, etc. Decision. Lacombe, J. July 23, 1887. (File mark.) Filed July 23, 1887.

24 [Endorsed:] United States circuit court, southern district of New York. Hugh Kelly *vs.* Edward L. Hedden. Copy. Opinion.

25 At a stated term of the United States circuit court for the southern district of New York, this 23 day of July, A. D. 1887.

Present: Hon. E. Henry Lacombe, circuit judge.

*Order Sustaining Demurrer.*

HUGH KELLY
*against*
EDWARD L. HEDDEN, Collector, &c. } No. 10887.

This action having been brought to trial on the issue of law joined herein, after hearing Stephen A. Walker, United States attorney, in support of the demurrer, and Charles Stewart Davison, Esq., in opposition, ordered that the demurrer be sustained, and that defendant have judgment and costs, to be taxed by the clerk of this court.

(Signed) E. HENRY LACOMBE.

Form of the above order approved.

CH'S STEWART DAVISON,
*Plaintiff's Attorney.*
STEPHEN A. WALKER,
*U. S. Attorney, for Defendant.*

26 Therefore the issue above joined is ordered by the said court to be tried at the circuit court appointed to be held at the United States court buildings in the city of New York on the first Monday of April in the year 1887.

And now, at this day, to wit, on the 23 day of July, in the year 1887, before the Hon. E. Henry Lacombe, judge of the said circuit court, at the U. S. court buildings in the city of New York, comes the said defendant, by his attorney, Stephen A. Walker, U. S. attorney, and the said plaintiff, although solemnly demanded, comes not.

And it appearing to the said court that the trial of said issue above joined has been duly noticed by and on behalf of the said defendant, pursuant to the rules and practice of this court, and that said defendant is entitled to judgment, as in case of nonsuit, by reason of the neglect and default of said plaintiff to prosecute the same:

Therefore it is considered that the said plaintiff take nothing by his said declaration, but that he be in mercy, &c., and that
27 the said defendant do go thereof without day, &c.

And it is further considered by the said court now here that the said defendant do recover against the said plaintiff twenty-two $\frac{45}{100}$ dollars for his costs and charges by him about his defence in this behalf laid out and expended, by the said court here adjudged to the said defendant and with his assent, according to the form of the statute in such cases made and provided, and that the said defendant have execution thereof, &c.

Judgment signed this 26th day of July, 1887.

(S'g'd) JOHN A. SHIELDS,
*Deputy Clerk.*

(Endorsed:) U. S. circuit court. Hugh Kelly *vs.* E. L. Hedden. Judgment record. Stephen A. Walker, U. S. attorney, attorney for defendant. (File mark.) U. S. circuit court. Filed July 26, 1887. Timothy Griffith, clerk.

28 Supreme Court of the United States, of October Term, in the year A. D. 188–.

HUGH KELLY, Plaintiff in Error,

*against*

EDWARD L. HEDDEN, Defendant in Error.

In error.

Afterwards, to wit, on the second Monday in said term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, came the said Hugh Kelly, by Charles Stewart Davison, his attorney, and says that in and by the record aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid was given for the said defendant in error against the said plaintiff in error, whereas

by the law of the land the said judgment should have been given for the said plaintiff in error against the said defendant in error, and the said plaintiff in error prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the plaintiff in error, may be restored to all things which he has lost by reason of said judgment.

CHA'S STEWART DAVISON,
*Attorney for Plaintiff in Error, 56 Wall St., New York City.*

(Endorsed:) U. S. circuit court. Filed Aug. 18, 1887. Timothy Griffith, clerk.

29 [Endorsed:] 10887. Supreme Court of the United States. Hugh Kelly *vs.* Edward L. Hedden. Ass'g'mt of error. C. Stewart Davison, pl'ff's attorney, 56 Wall St., New York.

A copy of the within paper has been this day received at this office. August 18, 1887. J.

STEPHEN A. WALKER,
*U. S. Attorney.*

30 *Joinder in Error.*

Supreme Court of the United States.

HUGH KELLY, Pl'ff in Error,

*vs.*

EDWARD L. HEDDEN, Def't in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Stephen A. Walker, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

(S'g'd) STEPHEN A. WALKER,
*U. S. Attorney and Attorney for Def't in Error.*

31 (Endorsed:) United States Supreme Court. Hugh Kelly, pl'ff in error, *vs.* E. L. Hedden, def't in error. Joinder in error. Stephen A. Walker, U. S. att'y and att'y for def't in error. Service of within joinder admitted this 18 day of August, 1887. (S'g'd) Ch's Stewart Davison, att'y for pl'ff in error. (File mark.) U. S. circuit court. Filed Aug. 18, 1887. Timothy Griffith, clerk.

32 U. S. Circuit Court, Southern District of New York.

HUGH KELLY

*ag'st*

EDWARD L. HEDDEN, Collector of the Port of New York.

I hereby consent that the plaintiff in the above-entitled action may deposit in the registry of this court the sum of twenty-five $\frac{00}{100}$ dollars in lieu of a bond on prosecuting a writ of error from the Supreme Court of the United States.

(Signed) STEPHEN A. WALKER,
*U. S. Attorney, Attorney for Defendant.*

Ordered accordingly.
Dated August 18th, 1887.
(Signed) E. HENRY LACOMBE.

(Endorsed:) United States circuit court, southern district of New York. Hugh Kelley *vs.* Edward L. Hedden. Stipulation. Ch's Stewart Davison, pl'ff's att'y, 56 Wall St. U. S. circuit court. Filed Aug. 18, 1887. Timothy Griffith, clerk.

33 U. S. Circuit Court, Southern District of New York.

HUGH KELLY
*ag'st*
EDWARD L. HEDDEN, Collector of the Port of New York. } No. 10887.

I hereby certify that the plaintiff, by his attorney, Ch's Stewart Davison, in the above-entitled action, has this day deposited in the registry of this court the sum of twenty-five dollars in lieu of a bond on prosecuting a writ of error in the Supreme Court of the United States.

Dated New York, August 18th, 1887.
(Signed) TIMOTHY GRIFFITH, *Clerk.*

(Endorsed:) U. S. cir't court, S. D. of N. Y. Hugh Kelly *vs.* Edward L. Hedden. Cert. of deposit. (File mark.) U. S. circuit court. Filed Aug. 18, 1887. Timothy Griffith, clerk.

34 UNITED STATES OF AMERICA, *ss:*

To Edward L. Hedden, late collector of the port of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Hugh Kelly is plaintiff in error and you are defendant in error, to

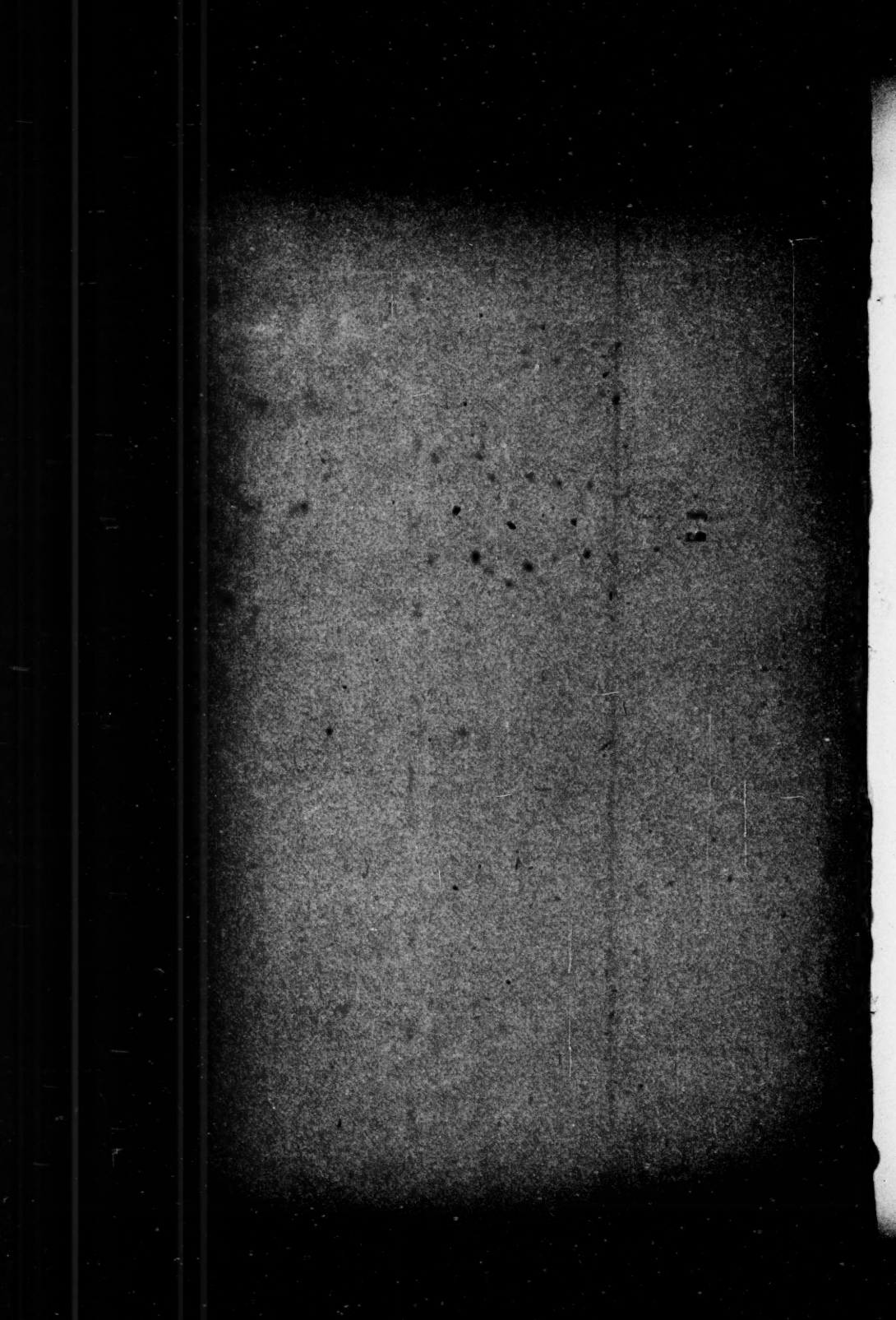
show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

Dated August 18, 1887.

E. HENRY LACOMBE.

35 [Endorsed:] 10887. Supreme Court of the United States of America. Hugh Kelly *vs.* Edward L. Hedden. Citation. Ch's Stewart Davison, pl'ff's att'y, 56 Wall St. A copy of the within paper has been this day received at this office. Aug. 18, 1887. J. Stephen A. Walker, U. S. attorney. U. S. circuit court. Filed Aug. 18, 1887. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 1012. Hugh Kelly, plaintiff in error, *vs.* Edward L. Hedden, late collector of the port of New York. Filed August 24th, 1887.



# Supreme Court of the United States.

**OCTOBER TERM, 1887.**

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*No. 1012.*

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HUGH KELLY, PLAINTIFF IN ERROR,

*against*

EDWARD L. HEDDEN, LATE COLLECTOR OF THE PORT OF NEW YORK, DEFENDANT IN ERROR.

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*In Error to the Circuit Court of the United States for the Southern District of New York.*

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☞N. B.—This brief also applies to the case of *James F. Whitney et al. vs. William H. Robertson, collector*, No. 108, October term, 1887, argued with this case; see, also, for that case the supplemental brief at the end hereof and bound with this argument.

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STATEMENT.

This case is brought here as a representative one to present the question of the alleged exemption from duty, under the existing tariff, of the products of the Dominican Republic which are like articles to the products of the Sandwich Islands that are free from duty under the special act of Congress approved August 15, 1876.

The issue thus stated arises upon a writ of error brought to review a judgment sustaining the defendant's demurrer to the importer's declaration.

The complaint shows the importation of products of the Dominican Republic upon which duties were paid under seasonable protest and claim for exemption from duty, and that the articles were of such character that, had they been imported from Hawaii, would have been admitted free of duty in accordance with the statute above mentioned.

This case does not correspond, either in circumstances or in its general surroundings, as is hereinafter shown, with any case that has hitherto been before this Court. It arises under a treaty that has not been judicially interpreted and under legislative exemptions inapplicable to any case that has hitherto been considered.

In the treaty between the United States and the Dominican Republic, dated February 8, 1867 (United States Treaties, p. 180), is found the following:

"ARTICLE IX.

"No higher or other duty *shall be* imposed on the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic or her fisheries and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article the growth, produce, or manufacture of the United States or their fisheries than are or *shall be* payable on the like articles the growth, produce, or manufacture of any other foreign country or its fisheries.

"No other or higher duties or charges *shall be* imposed in the United States on the exportation of any article to the Dominican Republic nor in the Dominican Republic on the exportation of any article to the United States than such as are or *shall be* payable on the exportation of the like article to any other foreign country.

"No prohibition shall be imposed on the importation of any article the growth, produce, or manufacture of the United States or their fisheries or of the Dominican Republic and her fisheries from or to the ports of the United States or the Dominican Republic which shall not equally extend to every other foreign country.

"ARTICLE X.

"Should any one of the high contracting parties hereafter impose discriminating duties upon the products of any other nation the other party shall be at liberty to determine the manner of establishing the origin of its own products intended to enter the country by which the discriminating duties are imposed."

By the act of Congress approved August 15, 1876, it was provided that whenever the President should receive satisfactory evidence that the legislature of the Hawaiian Islands had "passed laws on their part to give full effect to the provisions of the convention between the United States and His Majesty the King of the Hawaiian Islands, signed January 30, 1875, he is hereby authorized to issue his proclamation declaring that he has such evidence; and thereupon *from the date of such proclamation* the following articles, being the growth, manufacture, or produce of the Hawaiian Islands, to wit, arrowroot, castor-oil, bananas, nuts, vegetables, dried and undried seeds, plants, shrubs, or trees, muscovado, brown, and all other unrefined sugar, meaning hereby the grades of sugar commonly imported from the Hawaiian Islands and now known in the markets of San Francisco and Portland as 'Sandwich Island sugar,' sirups of sugarcane, mellada, and molasses and tallow, *shall be introduced into the United States free of duty* so long as the said convention shall remain in force."

The collector had exacted from the plaintiff upon the importations in controversy duties in accordance with the provisions of Schedule E of the tariff approved March 3,

1883, the plaintiff's importations having been made in the year 1885. (Record, p. 7.) The excess of duty paid and sought to be recovered was $2,121.80. (Record, p. 6.) By the said tariff act of 1883 (section 12), Schedule E took effect June 1, 1883, since which time and prior to the plaintiff's importations no pertinent legislation intervened.

By section 6 of the tariff act of 1883 the provisions of that act became a "substitute for title thirty-three of the Revised Statutes of the United States" and a statute for all existing tariff provisions from and after July 1, 1883. Except as authorized by the tariff of 1883 there existed no law imposing any duties upon the importations in question. In this tariff of 1883 was contained the following:

"SECTION 11. Nothing in this act shall in any way change or impair the force or effect of any treaty between the United States and any other government or any laws passed in pursuance of or for the execution of any such treaty so long as such treaty shall remain in force in respect of the subjects embraced in this act; but whenever any such treaty, so far as the same respects said subjects, shall expire or be otherwise terminated the provisions of this act shall be in force in all respects in the same manner and to the same extent as if no such treaty had existed at the time of the passage hereof."

The exemption from duty on the importation into the United States of such of the products of the Dominican Republic as correspond in all respects with the articles enumerated in the act of Congress approved August 15, 1876, arises from the three fundamental provisions of law above stated, namely:

1. The treaty provision of 1867, declaring that "no higher or other duty *shall be* imposed on the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic * * * than are or *shall be* payable on the like articles the growth, pro-

duce, or manufacture of any other foreign country or its fisheries."

2. The act of Congress approved August 15, 1876, exempting from any duty whatever molasses the growth, produce, or manufacture of the Hawaiian Islands.

3. The legislative declaration of section 11 exempting from the operation of the tariff schedules embraced in the tariff of 1883, articles affected by treaty provisions.

It will be observed that there is no limitation by way of conditions, considerations, compensations, or reciprocal stipulations in the act of Congress approved August 15, 1876, whereby Sandwich Island molasses "shall be introduced into the United States free of duty," *except* that such exemption is only to continue "so long as the said (Hawaiian) convention shall remain in force." This is the only limitation of any kind whatever after the said act of Congress commenced to operate. Its duration was prescribed, and the enactment was operative at the time of the importations in controversy. Nor are there any limitations depending upon compensation, equivalents, reciprocal advantages, conditions, or favors expressed in any article of this Dominician treaty by reason of which the language of its article IX is subject to any qualification or diminution of the obligation therein stated.

The claim of the Government in assessing duty under Schedule E was that the treaty with the Dominican Republic did not impair the application to the importations in question of the tariff provisions enacted in Schedule E, and hence the plaintiff's importations were liable to duty as if there was no treaty provision with the Dominican Republic by which the importations were affected.

The claim of the importer is that the articles in question are exempt from duty because the precise conditions contemplated by the law and the spirit of article IX of the Dominican treaty have occurred, and therefore, in the absence of

any intervening legislation, the stipulation of the article should be given full force and effect.

In short, that Dominican molasses should pay, on importation into the United States, "no higher or other duty" than molasses the "produce of the Hawaiian Islands."

This claim is antagonized by the Government, whose officers have occasionally argued that the meaning of the absolute and expressive terms in article IX is only that the United States shall charge on Dominican products no more than is charged upon the like products from that other nation which may be obliged to pay the highest or most exceptional duty that the United States may levy. Such a meaning reduces the provision to an absurdity and renders the successful efforts of our statesmen in procuring such a treaty engagement nugatory and their struggles therefor illusory.

The suit in the case at bar is in reality against the United States. The rights of no one else are involved. It is a suit to compel the United States to carry out its own solemn engagements, put into the form of law, in a case where it alone has profited by the violation complained of and plaintiff alone has suffered.

ASSIGNMENTS OF ERROR.

1. It was error to direct judgment for the defendant upon the demurrer.

2. It was error not to overrule the demurrer and permit the case to proceed to judgment upon the allegations of the declaration.

3. The declaration alleging that the importation in question was the growth, produce, and manufacture of the Dominican Republic, and like articles to those of the Hawaiian Islands which, under the act of Congress, are admitted free of duty, it was error to hold that no cause of action was stated.

I.

We take it for granted that for the purposes of this case the language used in article IX of the treaty with the Dominican Republic means just what the words in their ordinary acceptation and the facts of the case imply, namely, that the United States in the year 1867 entered into a solemn agreement with the Dominican Republic that "no higher or other duty" shall be imposed within its jurisdiction on the importation into the United States of molasses being the growth, produce, or manufacture of the Dominican Republic than are or shall be payable on like "molasses being the growth, produce, or manufacture of any other foreign country." (See article IX, Dominican treaty.)

The Constitution, article VI, provides: "This Constitution *and the laws* of the United States which *shall be* made in pursuance thereof *and all treaties* made or which *shall be* made under the authority of the United States shall be the supreme law of the land."

It will be observed that by this section treaties made and to be made are put upon the same footing, included in exactly the same conclusion, as laws to be made—that is, with the Constitution they are the supreme law of the land.

The supreme law of the land, therefore, in 1867 said that no higher or other duties *shall be* imposed on the importation into the United States of molasses from the Dominican Republic than of like molasses from any other foreign country.

According to all precedents the above-recited provision (article IX, Dominican treaty) means exactly the same as if there were an act of Congress declaring that duties on molasses thereafter imported from the Dominican Republic should be "no higher or other"—that is, should be the *same* as are or *shall be* payable on like molasses from any other foreign country, and the moment that like molasses was by

law admitted free from any other foreign country such molasses from the Dominican Republic was entitled to be admitted free.

The section of the Constitution above quoted affords a very striking illustration of the meaning of the words "*shall be*" in a law.

Such an effect has by the decisions of this court uniformly been given to such language.

In *Ware* vs. *Hylton*, 3 *Dallas*, 239, the following were the facts: Plaintiff, a British subject, sued for the recovery of a debt due to him from a citizen of Virginia contracted July 7, 1774. By statute of Virginia passed October 20, 1777, citizens of Virginia indebted to British subjects were authorized to pay the whole or any part of any debt into the loan office of Virginia, take a certificate and deliver it to the Governor and council, and he, the debtor, should then be *discharged* of the debt so paid. Defendant complied with this act. In 1783 the United States entered into a treaty with Great Britain containing this provision:

"ARTICLE IV. It is agreed that creditors on either side *shall* meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted."

This Court held that that treaty provision not only repealed the statute of Virginia of October 20, 1777, but it destroyed acts done and rights acquired under it, and that it annulled laws of the United States, past *or future*, contrary to the treaty.

The Court say, at page 242:

"But it is asked, Did the fourth article intend to annul a law of the States? and destroy rights acquired under it? I answer that the fourth article did intend to destroy all lawful impediments, past *and future*, and that the law of Virginia and the payment under it is a lawful impediment; and would bar a recovery if not destroyed by this article of the treaty. This stipulation could not intend only to repeal laws that created legal impediments to the recovery of the

debt (without respect to the mode of payment), because the mere repeal of the law would not destroy acts done and rights acquired under the law during its existence and before the repeal. * * * On the same ground that a treaty can repeal a law of the State, it can nullify it. I have already proved that a treaty can totally annihilate any part of the constitution of any of the individual States that is contrary to a treaty. It is admitted that the treaty intended and did annul some laws of the States, to wit, any laws, past *or future*, that authorized a tender of paper money to extinguish or discharge the debt and any laws, past *or future*, that authorized the discharge of executions by paper money or delivery of property at appraisement; because if the words 'sterling money' have not this effect it cannot be shown that they have any other."

In *Foster* vs. *Neilson*, 2 *Peters*, 314, plaintiff claimed title to certain lands in Louisiana under an alleged grant from the King of Spain made in 1803, after Spain, as the United States contended, had parted with this part of its territory to France, which grant the United States had continuously declined and refused to recognize. In 1819 a treaty was entered into between Spain and the United States which contained this provision:

"ARTICLE VIII. All the grants of land made before January 24, 1818, by his Catholic Majesty, &c., *shall be ratified and confirmed* to the persons in possession of the lands to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty."

In his opinion Chief Justice Marshall says: "Do these words [of the treaty] act directly on the grants so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?"

"A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. *Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the Legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department,* and the Legislature must execute the contract before it can become a rule for the court." This language is quoted in *United States* vs. *Renshaw,* 119 *U. S. R.,* 408.

It afterwards appeared in the case of *United States* vs. *Perchman,* 7 *Peters,* 88, where this same treaty came in question, that the treaty was drawn up in the Spanish as well as in the English language, and that article VIII, when translated from the Spanish copy of the treaty, read that the grants shall *remain ratified and confirmed* to the persons in possession, &c., instead of "*shall be ratified and confirmed,*" as stated in the English copy.

The court thereupon in this latter case decided that *no action by the Legislature was neccessary to give effect to this provision* of the treaty.

Chief Justice Marshall says (page 89):

"In the case of Foster *vs.* Neilson (2 Peters, 253) this Court considered these words as importing contract. The Spanish part of the treaty was not then brought to our view, and we then supposed that there was no variance between them. We did not suppose that there was even a formal difference of expression in the same instrument drawn up in the language of each party. Had this circumstance been known we believe it would have produced the construction which we now give to the article."

The construction thus given was approved in *Garcia* vs. *Lee,* 12 *Peters.*

It is submitted that under the rule laid down by the learned Chief Justice in the case of *Foster* vs. *Neilson* "the *terms of the stipulation*" in the *Dominican treaty do not* "*im-*

*port a contract" calling for action by the political department of the Government.* The language is "no higher or other duties *shall be imposed.*" Certainly this language does not imply, in the words of the Chief Justice, that "either of the parties engages to *perform* a particular act" *before* the treaty shall become operative. *It states a condition to ensue, not an affirmative act to be performed.* It engages to fulfill a stipulated obligation in the happening of a specific event.

In *Edye* vs. *Robertson*, 112 *U. S. R.*, 598, Mr. Justice Miller thus states the rule:

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail its infraction becomes the subject of international negotiations and reclamations so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress; but a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partakes of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof and all treaties made or which shall be made under authority of the United States shall be the supreme law of the land.'"

"A TREATY, THEN, IS A LAW OF THE LAND AS AN ACT OF CONGRESS IS WHENEVER ITS PROVISIONS PRESCRIBE A RULE BY WHICH THE RIGHTS OF THE PRIVATE CITIZEN OR SUBJECT MAY BE DETERMINED, AND WHEN SUCH RIGHTS ARE OF A NATURE TO BE ENFORCED IN A COURT OF JUSTICE THAT COURT RESORTS

TO THE TREATY FOR A RULE OF DECISION FOR THE CASE BEFORE IT AS IT WOULD TO A STATUTE."

See also *Chew Heong* vs. *United States*, 112 *U. S. R.*, 536.

In fortification of this proposition see citations in Appendix "C."

## II.

*The ninth article of the treaty of the United States with the Dominican Republic is so plain and explicit in its language and meaning that no legislation is required to put the same in force in the United States, and it must become a rule of action if the contracting parties had power to incorporate it in that treaty.*

The law-making power under the Constitution has by this article said that no other or higher duty—that is, the same duty—shall be imposed upon the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic than, or as, are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country. *The purpose of the United States to make the duties upon imports of articles from the Dominican Republic the same as those upon imports of like articles from any other foreign country is here as clearly and emphatically expressed as language can make it.* The sovereign law-making power of the United States says in plain terms that the duties upon these two classes of imports shall be the same. That language in an act of Congress would unquestionably effect just what it says—that is, that the duties upon those articles should be the same. The same force and effect must be given under the United States Constitution to this language contained in a treaty constitutionally made. (*United States* vs. *Forty-Three Gallons of Whisky*, 93 *U. S. Reports*, *p.* 196.)

In *Hauenstein* vs. *Lynham*, 100 *U. S. Reports*, p. 483, one Hauenstein died in 1861 in Richmond, Virginia, intestate, unmarried, and without children, leaving real estate. An

inquisition of escheat was prosecuted by the escheator for that district and judgment obtained. When about to sell the property plaintiffs in error, who were alien citizens of Switzerland, filed a petition setting forth that they were the heirs-at-law of the deceased and praying that proceeds of sale of the property should be paid over to them.

By the fifth article of the treaty between the United States and the Swiss Confederation, November 25, 1850, it is provided: "In case real estate situated within the territories of one of the contracting parties *should* fall to a citizen of the other party who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, there shall be accorded to the said heir or other successor such term as the laws of the State or canton will permit to sell such property. He *shall be* at liberty at all times to withdraw and export the proceeds thereof without difficulty and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated." No term was ever accredited or fixed by the laws of the State of Virginia as provided in this treaty. Justice Swayne in his opinion says:

"It was clearly the intention of the clause in question in the treaty of 1850 to secure to the beneficiaries absolutely the right "to sell said property" and "to withdraw and export the proceeds thereof without difficulty;" *otherwise the language used is a sham and a mockery.* The only qualification is as to the time within which the right must be exercised. It has been earnestly contended in behalf of the defendant in error that the State having fixed no time within which this must be done it cannot be done at all, and that the entire provision thus becomes a nullity and is as if it were not. The terms of the limitation imply clearly that *some time* and not that none was to be allowed. *If it had been proposed to those who negotiated the treaty to express in it the effect of this construction in plain language can it be doubted that it would have been promptly rejected by both sides as a solecism contrary to the intent*

*of the parties?* WHERE A TREATY ADMITS OF TWO CONSTRUCTIONS, ONE RESTRICTIVE AS TO THE RIGHTS THAT MAY BE CLAIMED UNDER IT AND THE OTHER LIBERAL, THE LATTER IS TO BE PREFERRED. (*Shanks* vs. *Dupont*, 3 *Peters*, 242.) Such is the settled rule in this Court."

*In Re Quong Woo*, 13 *Federal Reporter* 229, petitioner was arrested under an ordinance of the city of San Francisco preventing him from engaging in the business of carrying on a laundry. The treaty of the United States with China provided, article 6, that reciprocally Chinese subjects visiting or residing in the United States "*shall* enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation."

Justice Field says:

"The petitioner is an alien, and under the treaty with China is entitled to all the rights, privileges, and immunities as subjects of the most favored nation with which this country has treaty relations. Being a resident here before the passage of the recent act of Congress, he has, under the pledge of the United States, the right to remain and follow any of the lawful ordinary trades and pursuits of life without let or hindrance from the State or any of its subordinate municipal bodies except such as may arise from the enforcement of equal and impartial laws. His liberty to follow any such occupation cannot be restrained by invalid legislation of any kind."

*In Re Tubercio* vs. *Parrott, First Federal Reporter*, 481, the same treaty article was held to invalidate certain sections of the penal code of California prohibiting corporations or their officers from employing any Chinese or Mongolian. (See also *Hauenstein* vs. *Lynham, Supra.*)

## III.

*The relief claimed by the plaintiff under the facts conceded in this case call for the exercise of the powers pertaining solely to the judicial department of the Government and do not call for the exercise of the political powers of the Government.*

It is purely a question of whether the plaintiff owned the merchandise he imported, subject to a duty of $2,121, payable to the United States, or whether he owned it free of such duties and under the statutes, therefore, can recover the duties wrongfully exacted by the Government.

Such a question under the decisions of this Court is purely judicial and not in any sense political.

*State of Rhode Island* vs. *State of Mass.*, 12 *Peters*, 657.
*Cherokee Nation* vs. *State of Ga.*, 5 *Peters*, 1.
*State of Ga.* vs. *Stanton*, 6 *Wall.*, 50.
*Head Money Cases*, 112 *U. S. R.*, 598.
*U. S.* vs. *Ransome*, 119 *U. S. R.*, 426.
*And further cases cited in Appendix C.*

Courts of justice can interpose relief when the rights of persons or property are involved and when such rights can be presented under some judicial form of proceedings.

In the case at bar the rights of the Dominican Republic are not in question. The rights of our own citizens claiming property derived through the operation of the Dominican treaty—part of the law of the land—are asked to be adjudicated in accordance with the precise conditions pointed out by law for that anticipated purpose.

## IV.

The political departments of our Government have from the beginning of our national existence advocated and championed equal and reciprocal international relations with every foreign nation with whom they made a treaty.

As illustrating th is statement we refer to the citations and extracts from the published writings and speeches of the earlier statesmen of our Republic, quoted elsewhere in this brief, and to the resumé thereof in the notable opinion of

Mr. Justice Wayne, of this Court, in the case of *Oldfield* vs. *Marriott*, 10 *Howard R.*, 162. For convenience this review is embodied here, because it gives the most perspicuous history at that date of our diplomatic positions during the first three-quarters of a century of our national existence.

Justice Wayne says:

"Perhaps it is not too much to say, however much the changed political and productive condition of nations during the last half century may have aided in liberalizing navigation between them, that it would not have been what it now is if it had not been for the stand taken by the United States in respect to navigation and commerce as early as 1785, which has been kept ever since. Its basis was to ask for no exclusive privileges and to grant none, to offer from all nations and to ask from them that entire reciprocity of navigation which is made by each carrying to the other in its own vessels its own productions and those of all nations without regard to the places from which they may be shipped upon the same terms both as to vessels and cargoes as the vessels of each nation may take them to its own ports. One great object has been to produce such relations either by corresponding legislation or by treaties, the latter being preferred, as legislative liberty to trade is too vague and uncertain to secure to a nation all the advantages of its own commercial condition. Thirty years, however, passed before our proposals made any impression upon the restricted navigation system of Europe, and then only partially so. During all that time our vessels could only take to the countries with which we traded the productions of the United States. Even that could not be done to many of the ports and colonies of other nations. Repeated efforts were made to get for our vessels a larger carrying trade by offers to all nations of the same reciprocity.

It may be said, as it has been, that our liberal views were forced upon the United States by the necessities of their commercial condition at the close of the Revolutionary war. It may be so, but the remark admits the restraints that were upon navigation between nations, and it cannot be denied that the application of them to the United States brought its appropriate wisdom.

Our views upon commerce and navigation were a part

and parcel of the intellect and spirit of our men of that day, made what they were by the great events in which they had borne their parts and the difficulties which they saw were to be overcome before their country would be put upon a commercial equality with other nations. The trade which the States as colonies had been allowed with the other colonies of England was cut off by our separation. That with the mother country was subjected to the rigid exclusions of the third section of the navigation act of Charles II, chapter 12. The English system, too, in respect to navigation had been adopted by the other nations of Europe, with very slight exceptions, which can scarcely be said to have been relaxations. Heavy duties were laid upon our vessels and their cargoes by all of them. The trade and navigation of the United States with all parts of the world were altogether permissive, such as each nation chose to allow upon its own terms. Our treaty stipulations at that time with France, the Netherlands, and Sweden were not exceptions of any value. The only benefit from them was that the commerce and navigation of the United States could not be burdened more than that of *any other foreign nation*. With Great Britain, Spain, Portugal, and Denmark there was not even that reciprocity. In such a state of things the United States began their career as a nation. How changed our condition now.

Our views upon commerce were promulgated in the state papers of that day. As early as 1785 Mr. John Adams, then representing the United States in England, proposed a reciprocation of trade in the produce and manufactures of both nations and in foreign produce in the vessels of each upon the same terms and duties upon the vessels and their cargoes as national vessels might pay. His proposals were rejected with a refusal to make any commercial treaty with the United States. Mr. Adams says, in a letter to Mr. Jay, dated London, 21st October, 1785: "This being the state of things, you may depend upon it the commerce of America will have no relief at present, nor, in my opinion, ever, until the United States shall have generally passed navigation acts. If this measure is not adopted we shall be derided, and the more we suffer the more will our calamities be laughed at. My most earnest exhortation to the States, then, is and ought to be to lose no time in passing such acts." The temper of the times concerning navigation and com-

merce generally, and towards the United States especially, had been previously shown in Parliament by its rejection of Mr. Pitt's bill "to permit vessels belonging to citizens of the United States to go into the ports of the West India Islands with goods or merchandise of American origin and to export to the United States any merchandise or goods whatever, subject only to the same duties and charges as if they had been the property of the British natural-born subjects and had been exported and imported in British vessels." Afterwards *American vessels were altogether excluded from the British West Indies, and the staple productions of the United States could not be carried there even in British vessels.*

The exhortation of Mr. Adams had been disregarded by most of the States. Some of them adopted his recommendations, but, as others refused to concur, they were unavailing. The statesmen of England knew that it would not be generally done by the States, and thought, rightly, too, that, as Congress had not the power by the articles of confederation to pass national countervailing restrictions, England might trade with some of the States directly and through those indirectly with the rest of them upon her own terms. It was also truly said, in reply to our offers to negotiate, that in a confederacy of States, without plenary power to regulate their trade and navigation conjointly, it would be difficult to make and to exercise treaty commercial arrangements between them. This result awakened the American people to the full extent of their actual and prospective commercial condition. Greater efforts were made to get the States to pass connectively countervailing restrictions. They were urged to do so by every argument which could be drawn from these foreign restraints upon commerce which had already pressed the known enterprise of the American people almost into inaction by all that aggravation of commercial distress which would inevitably follow from the legislation of Great Britain in respect to American commerce since 1783 unless it was resisted. The newspaper essays of that day upon the subject will amply compensate a perusal of them. Without such a perusal and a careful attention to the acts of Parliament preceding that of the 28th George III, chapter 6, in connection with that act no one can have an historical idea of American commerce or of those causes which so much lessened the harmony of feeling between the two nations for so many years afterwards; now no longer felt,

and lost in the interest which both have in preserving their present liberal commercial intercourse.

Still the States did not pass countervailing restrictions. On that account, more than any other, those conventions were held which, happily, terminated in the present Constitution of the United States. The first countervailing act under it attracted the attention of the nations of Europe, particularly of the statesmen of Great Britain. The advantages which they had in our former national condition were lost. An English writer says the acts passed by the first Congress that met under the new form of government imposing discriminating tonnage duties did not escape the notice of British statesmen. Their injurious effects upon the navigating interest of Great Britain were at once perceived by them. They saw that American commerce was no longer at the mercy of thirteen distinct legislatures nor subject to the control of the king and council. As early as September, 1789, therefore, the acts imposing those duties were referred to the lords of the board of trade. The same committee was afterwards instructed to consider and report what were the proposals of a commercial nature it would be proper for the government to make to the United States. In January following the committee made a report upon the subject of American duties and also upon the general subject of the commercial relations between the two countries. The report was drawn up by Mr. Jenkinson, then Baron Hawkesbury, afterwards Lord Liverpool.

On the subject of a commercial treaty, especially in respect to navigation, it states: "After a full consideration of all that has been offered on the subject of navigation the committee think that there is but one proposition which it would be advisable for the ministers of Great Britain to make on this head to the Government of the United States in a negotiation for a commercial treaty between the two countries, namely, that British ships trading to the ports of the United States should be treated with respect to the *duties* upon tonnage and *imports* in like manner as the ships of the United States shall be treated in the ports of Great Britain; and also if Congress should propose, as it certainly will, that this principle of equality should be extended to our colonies and islands and that the ships of the United States should be there treated as British ships it should be answered that this demand cannot be admitted even as a subject of negotiation."

These extracts from that report show that the statesmen of Great Britain did not entertain the liberal notions of trade and navigation which then prevailed in the United States. They were brought up under an opposite policy, which had long prevailed—probably very proper at first, as a war measure—to break up the carrying trade of the Dutch, the great rival of Great Britain; but it had become with most of her writers and public men a fixed principle of the protection which each nation should give to its trade and navigation against the competition of other nations. We do not intend to enter upon that discussion, but in confirmation of those differences of opinion concerning trade and navigation which at that time existed between American and British statesmen we refer to Lord Sheffield's contemporary strictures on the necessity of inviolably preserving the navigation and collonial system of Great Britain.

Pursuing the point, however, that the stand originally taken by the United States has contributed to the present extended reciprocity of navigation between nations, we remark that the example of England towards the United States had directed the commercial policy of all the other nations of Europe with which the United States then traded. The utmost that could be gained from France, Spain, Portugal, the Netherlands, Denmark, and Sweden was that our commerce with them should be *put upon the footing of the most favored nation. That, however, was very short of what the United States had proposed* to Great Britain and the other nations just mentioned.

Those nations, yielding to the commercial supremacy of Great Britain, had not then made an effort to release themselves from it; nor were they in a condition to do so. In three years afterwards the intelligence and enterprise of the United States, unsubdued by past failures, induced them to renew their efforts to gain a more extended trade and navigation. Mr. Jefferson, then Secretary of State, made a report to Congress upon the subject. It has the ability of every paper written by him in his long political career. Mr. Forsyth says that it suggested: "First, friendly arrangements with the several nations with whom the restrictions existed, or separate acts of our legislation to counteract these defects. The end proposed to be attained by the first would have been a free commerce of exchange between the different nations in those descriptions of commodities which nature

had best fitted each to produce, subject to such modifications as purposes of revenue might render necessary; and it was supposed that its operation would be an exchange of the raw materials then produced in the United States either for manufactures which had received the last finish of art and industry or mere luxuries. Failing this the alternative of statutory prohibitions and countervailing duties and regulations was to be applied." Report of the Secretary of State to the Senate, 30th December, 1839. Upon the earlier state papers and newspaper essays already mentioned—the report of Mr. Jefferson, another by Mr. Hamilton (which preceded it), and the proposals of Mr. Adams in 1785—we rest our assertion that *the United States were in advance of other nations* in respect to the principles by which commerce and navigation should be conducted between nations. The refusal of Great Britain to meet our proposals in a corresponding spirit proves it. From what has been said it must be admitted also that from the beginning the countervailing commercial legislation of the United States has been strictly retaliatory. If further proof of either were wanting it may be found in the correspondence of Mr. Jay connected with his negotiation of the treaty of 1794 with Great Britain and in the treaty itself. As all of us know, the restrictions which were put upon our commerce by that treaty were offensive to the pride as well as the interests of the American people; but, being the utmost that England would yield at that time of her own long-established system, it was thought that the exigencies of our commercial condition required its ratification. Results proved it to be so. It did not reciprocate in any way the liberal views of commerce which had been indulged in the United States; but we now know that it was the most that could be got, and history not only relieves Mr. Jay from the complaints of that day, but places his memory far above them.

Notwithstanding the failure of every effort to place our navigation and commerce upon a better footing, nothing was done legislatively by the United States from which it can be said that there was any departure from the liberal policy which had been proposed to other nations. The natural advantages of the United States, the value of our productions, and the wars in Europe aiding the consumption of them were constantly overcoming foreign exclusions and kept us forbearing, if not always in good temper. In fact,

except discriminating duties upon tonnage in favor of our vessels to countervail such as all the nations of Europe had imposed in favor of their own ships—several of them intended to bear particularly upon American commerce—our legislation was, up to that time and for twenty years afterwards, exempt from every interference with a free navigation. In 1812, as a war measure, Congress passed an act doubling all duties upon goods imported into the United States, with an additional duty of ten per cent. upon such as might be brought in foreign vessels. The act also increased the duty upon the tonnage of foreign ships one dollar and fifty cents. That it was strictly a war measure is shown by its limitation to the continuance of the war with England.

When the war was at an end, and those in Europe had ceased by the overthrow of Napoleon, the United States took the earliest opportunity to renew their efforts for a more liberal navigation than had been at any time allowed by the nations of Europe with each other or with the United States.

In March, 1815, Congress declared that the discriminating duties laid by the act of July, 1812, upon foreign ships and their cargoes were no longer to be levied when the President should be satisfied that the discriminating and countervailing duties of any foreign nation had been abolished so far as they operated to the disadvantage of the United States. When that declaration was made, or shortly after it, our plenipotentiaries, Mr. John Quincy Adams, Mr. Clay, and Mr. Gallatin, were in London engaged in negotiating the commercial convention of 1815 with England. It is not doubted that the act had its influence upon the result. The convention contains all that the act proposes. It was the first relaxation made by Great Britain of her navigation laws in favor of free navigation, and the first step taken to meet the liberal principles of commercial intercourse which had been proposed to all nations by the United States so early in our history, as has been already stated. It secured national treatment for our vessels; equal terms for cargoes, whether imported or exported in United States or English ships; *equal import duties on the produce of the United States as on like articles the produce of other foreign nations;* but it still restricted the intercourse between the two nations to the production of either; in other words, to the direct trade.

Every effort which had been made by the United States for more than thirty years to give and get an indirect trade

had failed. Indeed, the continental nations were not only unwilling to make any such arrangement, but they refused to accept, as England had done, the terms offered by the act of the 3d of March, 1815. It was then determined to renew the discriminating duties which that act had modified. It was confidently believed that by doing so some of those nations which had disregarded that act would be coerced to accept its terms. It was done in April, 1816; and in January following another act was passed, subjecting foreign vessels coming from any port or place to which the vessels of the United States were not permitted to go and trade to a duty of two dollars a ton. The act was limited to six months; but in two months afterwards, during the same session, Congress, believing that the indefinite extension of it would effect its object sooner, passed such a law. Within the year Prussia, the Netherlands, and the Hanse towns repealed their discriminating duties upon American vessels in their ports, and their vessels were consequently admitted into the ports of the United States upon corresponding terms.

Much was gained compared with what had been our carrying trade. Still, the great object to get and to give an indirect trade had failed. It had been defeated by the refusal of England to relax that clause of the navigation act of Charles II., c. 12, which prohibited the produce and manufactures of every foreign country from being imported into Great Britain except in British ships, or in such as were the real property of the people of the country or place in which the goods were produced, or from which they could only be or were most usually exported. The same principle had been adopted by the continental nations to protect their own from the superior mercantile marine of England. Its increase, too, of English tonnage and commerce, its influence upon both of the other nations of Europe, and the recollection of its ruinous effects upon the trade of the Dutch, which it was originally meant to crush, had misled the judgment of most European statesmen into the conclusion that it was an essential regulation to protect the navigation of each nation from the competition of others. But the general pacification of 1815 restored the long-suspended commercial intercourse between them, and with it sounder views of trade. It was believed—indeed it had become known—that there were nations in

Europe who had become as anxious as the United States were to rid themselves of the restrictions imposed upon their commerce by the English navigation act. They were not, however, in a condition to do so immediately in respect to each other or unitedly against the supremacy of English navigation. Besides, our overtures to some of them for an indirect trade had not been met with the promptness or decision which had been anticipated. The time was favorable for more efficient legislation by the United States than had been made before. It was a matter of doubt and hesitation with many of our public men what could or should be done in such a crisis. Fortunately there were those among them who were more decided, and Congress determined to adopt the clause of the English navigation act of which we had always complained, with this proviso, however, that it should not be extended to the vessels of any foreign nation which had not adopted and which should not adopt a similar regulation. The proviso explains the purpose of the act of the 1st March, 1817. Before that was passed the United States had not had a navigation act. It was not, however, followed for several years by any coincident result. But about that time an incident occurred in the political world which was destined to change, in a great measure, the commercial intercourse between nations. It was the revolt of the Spanish American provinces from Spain, and the recognition of them by the United States and by England as independent nations. Both were anxious to secure a trade with these new States. The United States sought it *upon terms of the most extended reciprocity*, both as to *vessels* and *cargoes;* England, with more commercial liberality than her usual policy, without, however, yielding that main point of it which prevented foreign vessels from having an indirect trade to her ports. Indeed so fixed had that exclusion become with the nations of Europe that France, five years afterwards, would not relinquish in her treaty with the United States her right to impose discriminating duties upon cargoes brought into her ports by foreign vessels.

In 1825 the United States reaped the first fruits of the act of March 1, 1817. Then a treaty was made with Central America, *the first known between nations*, establishing that reciprocity in respect to vessels and *cargoes* which had been *offered forty years before* by the United States to other nations, and which had for seven years been tendered by the act of

March 1, 1817; that treaty was followed by others. Russia, Austria, Prussia, Denmark, Sweden, Sardinia, Greece, the Hanseatic cities, Hanover, Brazil, Equador, and Venezuela made treaties with the United States upon the same principle. The vessels of each of those nations were permitted to carry into the ports of the other, without discriminating duties, the productions of any foreign country, whether they were shipped from the places of production or elsewhere. In other words, the vessels of the United States, under those treaties, carry on with those nations an indirect trade, which they can do in their vessels to our ports. The act of 1817 was slow in producing any arrangement of a like kind with Great Britain, but it has ultimately done so. The original interpretation of it by Mr. Secretary Crawford having been renewed by Mr. Secretary Walker's circular, after an interruption of several years, a negotiation was opened with England upon the subject which resulted in giving to both nations the full intention and benefit of the act of 1st March, 1817. Its operation, as we have said, had been suspended for several years, from some official misapprehension of its import, when a case occurred in the circuit court of the United States for the southern district of New York in which the learned judge who presided gave the first judicial interpretation of the act. Judge Betts, in that case, reviews the legislative history of the act. The question presented in the case of the Recorder and her cargo was whether an importation into the port of New York by a British vessel from London of a quantity of silks, the production of the British possessions in India, was prohibited by the first section of the act of 1st March, 1817. The court decided that the word "country" used in the section comprehended the British possessions in India, and that consequently the importation was lawful. The learned judge took occasion also to give his views as to the effect of the proviso in the first section. Upon the publication of the court's opinion the Secretary of the Treasury availed himself of its authority in connection with what had been the first interpretation of the act, and issued his circular on the 6th of November, 1847, to the collectors and officers of the customs, directing them that "where it is satisfactorily shown that any foreign nation allows American vessels laden with goods, the growth, produce, or manufacture of any country out of the United States, freely to enter and land such merchandise in any of the ports of said country, whether

such goods be carried directly from the place of origin or from the ports of the United States or from any other country whatsoever, the penalties of the act of the 1st March, 1817, are not to be enforced against the vessels of such nations bringing like goods either from the country of production or from the ports of the country to which the vessels may belong." The opinion of Judge Betts and Secretary Walker's circular led to a negotiation, which terminated in Great Britain passing, in 1849, the statute of 12 and 13 Victoria, c. 49, and thus accomplishing the great purpose of our policy which had been proposed by the United States to the nations of Europe, to England particularly, in 1785, by Mr. Adams. The circular of Mr. Meredith of the 15th October, 1849, shows what that policy was and why it was issued. We give it at length:

"In consequence of questions submitted by merchants and others asking, in consideration of the recent alteration of the British navigation laws, on what footing the commercial relations between the United States and Great Britain will be placed on and after the first day of January next, the day on which the recent act of the British Parliament goes into operation, the Department deems it expedient at this time to issue the following general instructions for the information of the officers of the customs and others interested:

"First. In consequence of the alterations of the British navigation laws above referred to British vessels from British or other foreign ports will, under our existing laws, after the first day of January next, be allowed to enter our ports with cargoes of the growth, manufacture, or production of any part of the world.

"Second. Such vessels and their cargoes will be admitted, from and after the date before mentioned, on the *same terms as to duties, imports,* and charges as vessels of the United States and *their cargoes.*"

With such facts to sustain it as have been recited—and they are all official—it may very truly be said that the reciprocity of navigation now existing between nations, and particularly between Great Britain and the United States, is, in a great degree, owing to the perseverance of the United States in proposing and contending for it for more than sixty years. It cannot, therefore, be said, as it has been by more than one foreign writer, that after the American colonies had established their independence they set about to form a

code of navigation laws on the model of those of England. Those writers have mistaken our legislation for our history, without seeking in the latter the causes of the former.

Discriminating duties were never laid by Congress, except they were retaliatory and for the purpose of coercing other nations to a modification or repeal of their restrictions upon commerce and navigation. The leading point and constantly avowed intention of the United States have been to produce that reciprocity of trade for the vessels of different nations which had been denied by the nations of Europe for more than two hundred years. It was the American system contradistinguished from the European; the last now happily no longer so to the extent of its former and long-continued exclusiveness."

*Oldfield* vs. *Marriott*, 10 *Howard*, 162.

We also refer to the correspondence between the Marquis de Montholon and Hon. Wm. H. Seward, Secretary of State, exhibited in the Diplomatic Correspondence of the United States for 1867, part 1, page 287, when, in answer to a letter of De Montholon to Seward, dated December 15, 1866, and calling attention to the fact that by a statute of France passed May 16, 1866, tonnage duties levied on United States were to be thereafter abrogated and suppressed if the United States extended the same treatment to French ships, and the matter was referred by Secretary Seward to Secretary McCullough, of the Treasury, the latter reported as follows:

"I have to state in reply that I have read the note of the Marquis de Montholon and examined the accompanying law, published in France on the 16th of May, 1866, and, after carefully considering the same, I cannot but express to you my firm conviction that the time-honored policy of our Government in inviting and seconding international efforts for the removal of all unnecessary shackles on commerce and navigation is the true one, and that we should not cease to encourage and to follow any well-directed measures to that end so constantly cherished by us and now so well and wisely adopted by France in seeming response to proposals made by the United States in their very infancy as a nation.

In accordance with this policy, *differential duties* on foreign

cargoes have never found favor in the United States, and such imposts, as well as the discriminating tonnage dues imposed on certain vessels by the earlier acts of Congress, were mainly retaliatory in their nature and only levied to countervail the objections or restrictions of nations upon our flag and productions, and the act of 7th January, 1824, repeals all such duties whenever the President of the United States is satisfied that the discriminating or countervailing duties of any foreign nation, so far as they operate to the disadvantage of the United States, have been abolished. The wisdom of this act * * * has never been questioned or disturbed by succeeding legislation." On December 28, 1886, the President accordingly issued his proclamation.

(For further illustrations see later pages of this argument.)

V.

*As, therefore, the political departments of the Government of the United States have established these principles as the main features of their foreign policy in the matter of treaty-making and treaty relations, it becomes the duty of the judicial department to conform to them and to decide individual rights in cases before them according to those principles.*

*Equality of natural rights* as to individual citizens is the fundamental doctrine of our Declaration of Independence and National Constitution. The former said "all men are born free and *equal*," and the latter has emphasized this idea by proportioning representation to numbers and practically giving every citizen an *equal* voice in the Government through a suffrage based on manhood only.

*Equality of dealing*, both with our own citizens and with foreign people and nations, has been the aim and purpose of our National Government from its foundation to the present time. To effect this our Constitution committed to Congress the power "to levy and collect taxes, duties, imposts, and excises," and provided that they should be *uniform* throughout the United States (article 1, section 8); made direct taxes according to numbers

(article 1, section 2, subd. 3), and prohibited any State from denying to any person within its jurisdiction the *equal* protection of the laws (article XIV, section 1); empowered Congress to establish an *uniform* rule of naturalization and *uniform* laws on the subject of bankruptcies (article 1, section 8, subd. 4); to coin money, &c. (same, subd. 5), and prohibited the giving of any preference to the ports of one State over those of another (article 1, section 9, subd. 6). In the same line of *uniformity* Congress has passed such laws as the interstate commerce bill. Actuated by the same spirit, our statesmen, as shown by citations elsewhere in this brief and by the correspondence connected with the negotiation of all our treaties, have always urged and insisted upon establishing with every nation with whom they traded or treated one rule of dealing, viz., as expressed by Justice Wayne, that they would "*ask for no exclusive privileges and would grant none; would offer to all nations and ask from them that interreciprocity of navigation which is made by each carrying to the other in its own vessels its own productions and those of all nations, without regard to the places from which they may be shipped,* UPON THE SAME TERMS, BOTH AS TO VESSELS AND CARGOES, *as the vessels of each nation may take them to its own ports.*"

In furtherance of this principle our Government has continually discriminated against any nation who would not accede to the practice of the United States in this respect, and from the year 1828 to the present time there has stood upon our statute book an enactment authorizing the President of the United States to suspend the collection of such discriminating duties in favor of any nation who ceased discriminating against the United States. (U. S. R. S., sec. 4228.)

In Foster *vs.* Neilson, 2 Peters, 307, Chief Justice Marshall says:

"In a controversy between two nations concerning national boundaries it is scarcely possible that the courts of

either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably the right remains with the strongest. *The judiciary is not the department of the government to which the assertions of its interests against foreign powers is confided, and its duty commonly is to decide upon individual rights according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hestitate to pronounce it erroneous.*" (See also Garcia *vs.* Lee, 12 Peters, 523.)

VI

When, therefore, the United States, by act of Congress of August 15, 1876 (19 U. S. Statutes at Large, p. 200), and the proclamation of the President in pursuance thereof, on September 9, 1876, enacted that Sandwich Island molasses should "thereafter be introduced into the United States free of duty," the Dominican treaty (being at that time a part of the supreme law of the land and containing the provision that duties on molasses from the Dominican Republic, like Sandwich Island molasses, should be no higher or other—that is, should be the same as those on Sandwich Island molasses) took effect according to its terms and effected that by law molasses from the Dominican Republic that was like Sandwich Island molasses should thereafter be introduced into the United States free of duty.

To hold anything else than this would do violence to the language used in expressing the supreme law of the land, and would repudiate the whole policy of the political departments of our Government in entering into treaties with foreign nations, and would belie the spirit of the age in favor of "*equality*" evinced in our Constitution, acts of Congress, and the history of our diplomatic intercourse with foreign nations.

The judiciary should, therefore, seek so to harmonize all

laws and treaties that none should be violated, and that all should unite in the general contributions towards sustaining the simple and unequivocal policy which was their inspiration.

## VII.

On March 3, 1883, Congress repealed all prior tariffs and enacted (Vol. 22, U. S. Stat. at Large, p. 491):

"There shall be levied, collected, and paid upon all articles imported from foreign countries and mentioned in the schedules herein contained the rates of duty which are by the schedules, respectively, prescribed, namely, * * * Schedule E. * * * 'Molasses,'" specifying a rate per gallon.

SECTION 11. "Nothing in this act shall in any way *change or impair the force or effect of any treaty* between the United States and *any* other government or any laws passed in pursuance of or for the execution of any such treaty so long as such treaty shall remain in force in respect to the subjects embraced in this act."

The "force and effect" of the treaty of the United States with the Dominican Republic at that time, as saved by this clause of the statute, was to admit molasses from that Republic that was like Sandwich Island molasses into the United States free of duty. No other meaning can be yielded to the language of the treaty.

Such an interpretation is consistent with the diplomatic history and the foreign policy of the United States from the beginning; is also consistent with the spirit of our Constitution, which is founded upon equality, and expressly declares that "all duties, imposts, and excises shall be *uniform* throughout the United States;" is also consistent with the public utterances of *all* our statesmen and the enactments of Congress in carrying out the policy they inaugurated, and also coincides with the interpretation other nations and their statesmen have given to the same language in treaty negotiations.

The "full force and effect" of that language in this treaty is expressly saved and declared to be unimpaired in 1883 by the above act of Congress.

VIII.

*The interpretation contended for by the plaintiff in this case is in accord with the spirit shown by this Court in applying to cases before them involving questions connected with international law a construction both liberal and progressive, and also is in full accord with the canons of international law as laid down by the most eminent publicists and writers upon that subject.*

In *United States* vs. *Rauscher*, 119 *U. S. R.*, 408, the right of the United States to try an extradited prisoner for offenses not included in the treaty provisions and for which he was not actually delivered to the United States authorities by the other treaty power was considered and decided by this Court. Justice Miller says:

"If the proceedings under which the party is arrested in a country where he is peaceably and quietly living and to the protection of whose laws he is entitled are to have no influence in limiting the prosecution in the country where the offense is charged to have been committed, there is very little use for the particularity, exhibited in the treaty 'in charging a specific offense, requiring that offence to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt, to put him upon trial for it; nor can it be said that in the exercise of such a delicate power under a treaty so well guarded in every particular its provisions are obligatory alone on the State which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offense free from all the *positive requirements and just implications of the treaty* under which the transfer of his person takes place.' * * *

"If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceed-

ings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case *for any other purpose than that mentioned in the treaty* and ascertained by the proceedings under which the party is extradited without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted his extradition. *No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.*"

Illustrations might be multiplied in quotations from distinguished publicists and jurists to show the spirit which should govern in applying treaties.

The principles by which treaties should be construed are accepted without dissent by the acknowledged authorities.

By the United States Constitution (art. 6, sec. 2) treaties as well as acts of Congress made under the Constitutien are the supreme law of the land. (1 Kent, Com., 166.)

In seeking for that law neither courts nor officers will create imaginative repugnancy, nor will it be assumed that any department wittingly evades or eludes obedience to the constitutional mandate.

In the exposition of treaties, statutes, and contracts there is the common necessity to ascertain intention, deducing it when possible from the language itself, but aided, if necessary, by such useful factors as the occasion of its use, the accepted signification of an expression, the public history of the times, and the purpose, when it is obvious, that is sought to be accomplished by the language selected. "In treaties made with different parties the inquiry in cases of conflict (says Woolsey, Int. Law, p. 186) touches the *moral obligation*." Treaties are recognized as the highest order of civil obligation known to civilized society. By reason of their international effect, the circumstances attendant upon their origin, negotiation, ratification, and operation, the history of treaties does not exhibit contentions touching their import and sig-

nification of the character attendant upon controversies over the import and signification of statutes and of contracts.

In interpreting treaties due and judicial regard should be had to the occasion which produced them, the subject-matter of their stipulations, the object for which and the epoch during which they were contracted. (2 Phil. Int. Law, p. 56.)

"When the apprehension of a particular event has been the reason of a particular provision of a treaty this provision is not to be restricted to cases in which such an event is improbable, but to be extended to cases in which the event is possible." (Vattell, *ibid.*, p. 107.)

"As a matter of international law, there is no doubt that if the treaty-making department of a nation concludes a treaty by which it is agreed that certain things are to be done the nation is bound, and it is no answer to another nation, in case of a breach of the contract, to set up a failure of a different department of the government to conform to the treaty. That amounts to no more than giving the internal municipal history of the breach. The distribution of powers a nation chooses to make in its own constitution of government furnishes no excuse for a failure of the nation to do what it has contracted to do. As matter of constitutional law it follows from the above statement that *each department of government must discharge its appropriate function* towards the performance of whatever the nation has bound itself to do." (Note to Dana's Wheaton's International Law, section 266.)

"If the consent of a local or subordinate authority is necessary to give effect to any part of the treaty that should appear in the treaty itself." (*Ibid.*) And so it has been the custom of the United States in its treaties to insert appropriate clauses of that character when such action is required.

While Congress is under obligation to do that which on its part may be essential (*e. g.*, by way of appropriation) to execute a treaty provision, yet that obligation is no greater than the obligation resting on other departments of the Government to execute all treaties so far as a department

under its appropriate functions is authorized to administer and to apply the provisions of law which by the United States Constitution may be contained in treaty provisions. Nor can this obligation be escaped by the judiciary because it may deem Congressional action in a given case wiser and more expedient than the conservative declarations of the bench.

The Supreme Court of the United States, by its traditions and duties, is especially constituted to interpret and to apply international obligations in their relations to municipal law, and in so doing will summon to its aid so much of the recognized law of nations as has already passed into and become part of the common law.

"Treaties of every kind, when made by the competent authority, are as obligatory on nations as private contracts are upon individuals, and they are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and force of reasoning which we apply to the interpretation of private contracts." (1 *Kent Com.*, 175.)

"Compacts between individuals should be interpreted according to the natural, fair, and received acceptation of the terms in which they are expressed." (*U. S.* vs. *D'Autervie*, 10 *How.*, 609.)

"In the fulfillment of treaty stipulations a liberal spirit should be observed." (1 *Wall.*, 352.)

"That construction most favorable to its execution designed by the parties will be preferred." (2 *Whart. Dig.*, *int.* 1, *p.* 34.)

"If two constructions become possible, 'one restrictive as to rights that may be claimed under it and the other liberal, the latter is to be preferred. Such is the settled rule of this court.'" (100 *U. S.*, 487.)

## IX.

### *Origin, Growth, and Particular Objects of the Clause—Its Operation.*

The treaty provision under special inquiry in this case, never having been by itself judicially interpreted, is entitled to further examination touching its origin, development, purpose, and operation.

Such an examination will fortify this argument at EVERY point.

The special value, significance, and operation of a treaty provision for the purpose and according to the language expressed in article 9 of the Dominican treaty is aptly stated in a speech made by Mr. Madison on April 15, 1792, when he referred to a similar clause proposed for a British treaty (viz., article 15, elsewhere quoted in this argument) in these terms:

"In the treaties which profess to put us on the footing of the *most favored nation* it is stipulated that where new favors are granted to a particular nation in return for favors received the party claiming the favor shall pay the price for it. This is just and proper where the footing of the most favored nation is *established at all; but this article gives to Great Britain the full benefit of all privileges that may be granted to any other nation without requiring from her the same equivalent privileges that were granted by such nation.* Hence, it would happen that if Spain, Portugal, or France should open their colonial ports to the United States in consideration of certain privileges in our trade the same privileges would result *gratis* and *ipso facto* to Great Britain."

So if the United States opens free trade to Hawaiian molasses the same privilege in our trade would result *gratis* and *ipso facto* to any nation whose treaty with us contained that precise stipulation. This is the identical engagement

specified in article 9 of the Dominican treaty, and this engagement is without qualification elsewhere in that treaty.

"No higher or other duty shall be imposed on the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic or her fisheries and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article the growth, produce, or manufacture of the United States or their fisheries than are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country or its fisheries." (Article IX, Dominican.)

A. (1.) In the limited consideration which this treaty language has hitherto received in diplomatic or juridical literature it has frequently, and perhaps at times unnecessarily, been associated with obligations or rights more or less dependent or obligations or rights appertaining to the most "favored nation."

From some cause, doubtless more or less accidental, but unwarranted by history or by the language used, this treaty article has usually been associated in the public mind, and indeed in the thoughts of some studious persons, with the common and ancient form of international obligation which has been recently termed the "parity clause of the ordinary form of treaty."

This "ordinary form" is generally in terms that the parties "engage mutually not to grant any particular favor to other nations in respect to commerce and navigation which shall not immediately become common to the other party, who shall enjoy the same freely if the concession were freely made or upon allowing the same compensation if the concession were conditional."

In the case at bar it is essential to disassociate this clause or any clause corresponding to it, or any considerations attendant upon such clauses, from the discussion of the significance and operation of the phrases actually employed in article IX of the Dominican treaty.

It is therefore in this case unnecessary to argue that these two provisions are independent of each other and subserve different purposes. The question here presented is, What is the independent meaning of one of them—article IX—in the *absence* of the other?

In so far as that meaning may be illumined by the force and effect claimed for the treaty stipulations for advantages or rights which the "most favored nation" does or shall enjoy, it may prove useful to consider briefly the general scope and operation of such stipulations for the purpose of distinguishing their absence, and thus the more safely to construe that which is present and expressed.

Indeed, the omission in the Dominican treaty of any allusion whatever to a "favored nation" is, in any view of the case, too significant to escape consideration.

As to the meaning and operation of treaty stipulations dependent upon rights, privileges, or exemptions "which the most favored nation does or shall enjoy," there have been at various times in our history some differences of opinion among American statesmen. Among European writers and statesmen, however, there will be found a general conformity of opinion.

When the incidents of international intercourse, the rights affecting navigation, domicil, private property, commerce, trade in certain articles or with certain places, were not governed by general laws, but in each sovereignty were dominated by sovereign *favor*, it was not difficult for a sovereign to measure one favor by another. Any attempt to *distinguish* one favor from another by weighing their respective equivalents or compensations or otherwise was at the risk of the peace of the state or the annullment of treaty.

In the history of the formative period of these United States these considerations were not specially important. Indeed, they were quite subsidiary to the main efforts (1) to harmonize and to unify into a homogeneous policy the foreign relations of each and all of these United States, and (2)

after securing salutations and amity for the new nation to base the international relations of these United States upon a uniform equality in all matters relating to trade, navigation, and commerce. While the history of these efforts would be legitimately pertinent in the aspect stated, it is manifestly impracticable in this brief to treat of them either generally or in detail. In so far as they culminated, however, in treaties attained, laws made, or even in executive acts or departmental instructions, the purposes of American treaty-makers from 1776 to 1867 challenge attention in any adequate judicial consideration of the case at bar. Through this examination will be disclosed the blending and the disintegration of the two provisions under inquiry and the forms of language by which the general purposes respectively covered by these provisions were molded to the various diversifying exigencies of our foreign relations.

(2.) The war of 1812–1814 furnishes a convenient period of separation between important chapters in American diplomacy. The experiences in the negotiations and operations of United States treaties prior to that epoch had a notable influence in the conduct of our subsequent relations. Renewed efforts were then initiated towards that reciprocity and equalization sought for by the founders of the Republic, and the influence of congressional enactments for discriminations and countervailing duties was added to the skill of American negotiators in securing satisfactory stipulations. The provisions thereafter established and the adequacy of the language incorporated into them to accomplish the purpose intended are no longer the subject of doubt. The general design had already been made clear, but wherever practicable laxity and ambiguity of expression had been superseded by precision and definiteness according to the specific thing to be accomplished.

(3.) The provision of article IX in question furnishes one

such illustration capable of abundant fortification from its history.

When first used in American treaties the phrase, referring to merchandise, of "no other or greater duties" was limited in its application to the subjects of the contracting parties, and dependent upon duties "which the nations most favored are or shall be obliged to pay." Moreover, it was associated with the further "parity clause of the ordinary form of treaty," whereby the parties contracted not to grant particular favors wnich should not immediately become common upon similar equivalents.

The following are the instances thus cited—the French treaty of February 6, 1778:

"ART. 2. The most Christian King and the United States engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same favor freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional.

"ART. 3. The subjects of the most Christian King shall pay in the ports, wharves, roads, countries, islands, cities, or towns of the United States, or any of them, no other or greater duties or imposts, of what nature soever they may be or by what name soever called, than those which the nations most favored are or shall be obliged to pay, and they shall enjoy all the rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce, whether in passing from one port in the said State to another or in going to and from the same from and to any part of the world which the said nations do or shall enjoy.

"ART. 4. The subjects, peoples, and inhabitants of the said United States, and each of them, shall not pay in the ports, wharves, roads, isles, cities, and places under the domination of his most Christian majesty in Europe any other or greater duties or imposts, of what nature soever they may be or by what name soever called, than those which the most favored nations are or shall be obliged to pay, and they shall enjoy all the rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce, whether in passing

from one port in the said dominions in Europe to another or in going to and from the same from and to any part of the world which the said nations do or shall enjoy.

"ART. 5. In the above exemption is particularly comprised the imposition of one hundred sous per ton established in France on foreign ships, unless when the ships of the United States shall load with the merchandise of France for another port of the same dominion, in which case the said ships shall pay the duty above mentioned, so long as other nations the most favored shall be obliged to pay it; but it is understood that the said United States, or any of them, are at liberty, when they shall judge it proper, to establish a duty equivalent in the same case." (1st Ell. Dip. Code, 36.)

The terms used in the language of these articles are significant and instructive. This treaty is alluded to by Secretary of State Adams (in his general instructions to Minister Anderson—preface 1 Ell. Dip. Code, p. 9) as being "to the foundation of our commercial intercourse with the rest of mankind what the Declaration of Independence was to that of our internal government." * * * "The preamble is believed to be the first instance on the diplomatic record of nations upon which the true principles of all fair commercial negotiations between independent States were laid down and proclaimed to the world." Alluding to the Declaration of Independence, Mr. Adams added: "The two instruments were parts of one and the same system, matured by long and anxious deliberation of the founders of this Union in the ever memorable Congress of 1776, and as the Declaration of Independence was the fountain of all our municipal institutions, the preamble to the treaty with France laid the corner-stone for all our subsequent transactions of intercourse with foreign nations." * * * His minister was instructed that the above-quoted articles contained "the practical exposition of those principles which may serve as models for insertion in the projected treaty or in any other that we may hereafter negotiate with any of the rising republics of the South."

(4.) The exemption of the subjects or people of the respective contracting parties to "no other or greater duties" than those which the most favored nations pay or shall pay has in later days been better expressed by reference to the productions of the respective treaty powers and comparison therewith of the duties or imposts paid on like productions by any other powers whatever. As this was the actual meaning and effect of the stipulations in the articles above quoted in 1778, so in the diversified relations of commercial intercourse in the year 1885 is the language improved, intensified, and made incapable of ambiguity, when, as in the case at bar, the reciprocal engagement stipulates that no other or higher duties shall be paid than are paid on the like products from any other nation. The meaning and effect was the same in 1778 and in 1867.

(5.) In so far as the stipulations in this French treaty of 1778 were measured by rights or advantages that the "nation most favored" does or shall enjoy, there was in the use of those special terms no new departure in diplomacy. The special value of this treaty to the United States did not concern considerations particularly applicable to this phrase. Yet, if it were otherwise, the language employed followed the accustomed phrase of statecraft. Of this one illustration may suffice:

By a treaty negotiated and signed between France and England in 1713 (peace of Utrecht) it was provided in its article VIII "that all subjects of the sovereigns of Great Britain and France in all places subject to their power on either side should enjoy the same privileges in all matters relating to 'duties, impositions, or customs whatsoever concerning persons, goods and merchandise, ships, freights, seamen, navigation, and commerce,' as well as to tribunals etc.," "which any foreign nation the most favored has, uses, and enjoys or may hereafter have, use, and enjoy."

By article IX it was engaged that within two months the

English Parliament should pass a law repealing all prohibitions of French goods which had been imposed since 1664, and enacting that no French goods imported into England should pay *higher duties than similar goods imported from any other European country;* and France was to repeal all prohibitions against the English goods that had existed since 1664, and restore the tariff of that year.

Here it is clear that the treaty-making powers stipulated directly for domestic legislation, obviously to render immediately effective a stipulation more or less dependent upon a favored-nation clause. The attempt to pass such legislation in England produced the crisis which overthrew the Tory party. It was universally conceded that the effect of such an enactment would be to allow French wines to be brought into Great Britain upon the same duties as were then paid by the Portuguese under the treaty between Great Britain and Portugal. This treaty had stipulated that Portuguese wines should be admitted into England at a duty one-third less than imposed on French wines at the time of making the treaty. (See Lecky's History of the 18th Century, Vol. 1, p. 154–5.)

Thus the European statesmen of that day conceded the effect of dependency on favored-nation clauses to be that the stipulated immunity was immediately measurable by the privileges of the most favored nation and was in nowise dependent upon what the most favored nation had given as consideration for its favor, or whether it enjoyed it without any compensation or consideration.

It was to avoid the necessity of recourse to the political power that American statesmen afterward stipulated (as hereinafter described), wherever possible, for absolute advantages dependent exclusively on the advantages actually enjoyed by "any other foreign country," irrespective of favor or compensation or the considerations by which those supposed advantages had been secured.

(6.) This first American treaty of 1778 above referred to was no accidental achievement. The provisions above quoted from it followed as closely as attainable the ends desired by the able men who in that day shaped the destinies of this country; objects which, among other things, included equality and reciprocity in navigation and trade with the islands and colonial possessions of foreign powers as well as with their home territories; objects, indeed, which to this day are not attained in our treaties with Great Britain, Spain, and other nations having valuable colonial possessions.

This treaty was based on a carefully matured "plan" which Congress, as early as 1776, confided to its Committee of Secret Correspondence for proposals of treaties to foreign nations.

Mr. J. C. B. Davis, says:

"This remarkable state paper contains the germ (often expressed in the identical language) of many of the provisions of subsequent treaties of the United States. In one respect it was many years in advance of provisions actually incorporated into any treaty. Its first and second articles stipulated that the citizens of each country in the ports of the other should pay no other duties or imposts than the natives were required to pay, and should enjoy the same privileges, immunities, and exemptions in trade, navigation, and commerce which natives enjoy; and the twelfth article contemplated a similar reciprocal agreement in respect of some exports. It was not until after the peace of 1814 that this principle of reciprocity was incorporated into a treaty of the United States." (2 Whart. Int. L. Dig., p. 122.) The "plan," thus described sufficiently for all present purposes, will be found in Secret Journals of Congress, volume 2, page 32; and 2 Am. Arch., 5th series, p. 1349.

Upon this plan was immediately based the treaty of October 8, 1782, with the Netherlands (3 Sec. J., 289). This treaty recites as "the rules to be observed relative to the commerce and correspondence" it had in view between the

two countries to establish the most perfect equality and reciprocity for the basis of their agreement, and by avoiding all those burdensome preferences which are usually the sources of debate, embarrassment, and discontent, the parties stipulate in article 1 for amity, peace, and friendship; in articles 2 and 3 that their respective peoples shall pay in all the dominions of the other "no other or greater duties" "than those which the nations most favored are or shall be able to pay." It will be observed that there is absent from this treaty the ancient and in the presence of specific engagements the comparatively valueless provision that the parties engage "mutually not to grant any particular favor to other nations in respect of commerce and navigation which shall not immediately become common to the other party, who shall enjoy the same freely if the concession were freely made, or on allowing the same compensation if the concession were conditional." The absence of an article in these terms in a treaty made thus early by the founders of our Government exhibits the significance in their view of the allusions in the foregoing preamble to "the sources of debate, embarrassment, and discontent."

Upon the foregoing plan also was immediately based the treaty with Sweden of April 3, 1783 (3 Sec. J. For. Aff., p. 369), in which by its articles 3 and 4 the people of the respective countries are not to pay in the other "any other nor greater duties nor imposts of what nature soever than those which the most favored nations are or shall be obliged to pay." Of Sweden it has been said that it was the only power in Europe which at that time voluntarily offered its friendship to the United States, and, without solicitation, proposed a treaty, the form of which appears to have preceded the treaty with the Netherlands. This circumstance may aid to explain the presence in the treaty with Sweden of the general favored-nation clause above referred to, which is not found in the treaty with the Netherlands.

At all events these treaties placed each of the powers in

respect of commerce and navigation within each and every one of the United States on the footing of the most favored nation.

(7.) It will save reference to authorities to quote here those parts of the instructions given to our ministers in 1783 and in 1784. They are as follows: Instructions of October 29, 1783 (found in 3rd Vol. Sec. J of Congress, For. Aff., 1781, 1786, p. 412).

" * * * Secondly. You are instructed to meet the advances and encourage the disposition of the other commercial powers of Europe for entering into treaties of amity and commerce with these United States. In negotiating on this subject you will lay it down as a principle, in no case to be deviated from, that they shall, respectively, have for their basis the mutual advantage of the contracting parties on terms of the most perfect *equality and reciprocity*, and not to be repugnant to any of the treaties already entered into by the United States with France and other foreign powers."

In a resolution on same date Congress recites: "That, having founded the commercial system of these States on the basis of *equality and reciprocity*," * * * it will cheerfully unite in encouraging the most friendly intercourse," &c., &c., &c.

The instructions to the ministers plenipotentiary to negotiate treaties of commerce with the European nations of May 7, 1784, were as follows:

"Whereas instructions, bearing date the 29th day of October, 1783, were sent to the minister plenipotentiary of the United States of America at the Court of Versailles, empowered to negotiate a peace, or to any one or more of them, for concerting drafts or propositions for treaties of amity and commerce with the commercial powers of Europe:

*Resolved*, That it will be advantageous to these United States to conclude such treaties with Russia, the Court of Vienna, Prussia, Denmark, Saxony, Hamburg, Great Britain, Spain, Portugal, Genoa, Tuscany, Rome, Naples, Venice, Sardinia, and the Ottoman Porte.

*Resolved*, That in the formation of these treaties the following points be carefully stipulated:

1st. That each party shall have a right to carry their own produce, manufactures, and merchandise in their own bottoms to the ports of the other, and thence the produce and merchandise of the other, paying, in both cases, such duties only as are paid by the most favored nation, freely, where it is freely granted to such nation, or paying the compensation where such nation does the same.

2. That with the nations holding territorial possessions in America a direct and similar intercourse be admitted between the United States and such possessions; or, if this cannot be obtained, then a direct and similar intercourse between the United States and certain free ports within such possessions; that, if this neither can be obtained, permission be stipulated to bring from such possessions, in their own bottoms, the produce and merchandise thereof to their States directly, and for these States to carry in their own bottoms their produce and manufactures to such possessions directly.

3. That these United States be considered in all such treaties and in every case arising under them as one nation, upon the principles of the Federal Constitution.

* * * * * * *

9. That these instructions be considered as supplementary to those of October 29, 1783, and not as revoking, except when they contradict them; that where in treaty with a particular nation they can procure particular advantages, to the specification of which we have been enabled to descend, our object in these instructions being to form outlines only and general principles of treaty with many nations, it is our expectation they will procure them, though not pointed out in these instructions; and where they may be able to form treaties on principles which, in their judgment, will be more beneficial to the United States than those herein directed to be made their basis, they are permitted to adopt such principles; * * * and that it will be agreeable to us to have supplementary treaties with France, the United Netherlands, and Sweden, which may bring the treaties we have entered into with them as nearly as may be to the principles of these now directed, but that this be not pressed if the proposal should be found disagreeable."

nation on every article. This stipulation leaves each party at liberty to regulate their own commerce by general rules, while it secures the other from partial and oppressive discriminations. The difficulty which arises in our case is with the nations having American territory. Access to the West Indies is indispensably necessary to us; yet how to gain it when it is the established system of these nations to exclude all foreigners from their colonies. The only chance seems to to be this: Our commerce to the mother country is valuable to them. We must endeavor, then, to make this the price of an admission into their West Indies, and to those who refuse the admission we must refuse our commerce or load theirs by odious discriminations in our ports. We have this circumstance in our favor, too, that what one grants us in their islands the others will not find it worth their while to refuse." * * *

(8.) Under the instructions, and of course shaped more or less by the views of Jefferson above quoted, was consummated the treaty with Prussia of September 10th, 1785 (4 Sec. J., 25; Davis Treaties, p. 707). In this treaty articles 2, 3, and 4 show that in respect to the favors there stipulated for, adequate provision was made wherever possible for immediate self-execution of the treaty. Thus in regulating commercial intercourse by perfect reciprocity for each in its own vessels in the dominions of the other, rights were expressly reserved to retaliate and prohibit against other nations where restrictions might render such a policy expedient, and " when reasons of state shall require it. In this case the subjects or citizens of either of the contracting parties shall not import nor export the merchandise prohibited by the other, but if one of the contracting parties permits any other nation to import or export the same merchandise the citizens or subjects of the other shall immediately enjoy the same liberty." Thus, by exact specification, it was the manifest intent that the treaty, although more or less dependent upon what was accredited to a favored nation, was, nevertheless, self-executing and immediately operative under the circumstances stated. Article 2 of this treaty provided that

"subjects of His Majesty the King of Prussia may frequent all the coasts and countries of the United States of America and reside and trade there in all sorts of produce and manufactures and merchandise, and shall pay within the said United States no *other or greater duties*, charges, or fees whatsoever than the most favored nations are or shall be obliged to pay, and they shall enjoy all the rights, privileges, and exemptions in navigation and commerce which the most favored nation does or shall enjoy, submitting themselves, nevertheless, to the laws and usages there established, and to which are submitted the citizens of the United States and the citizens and subjects of the most favored nations."

Again, in this treaty is clearly exhibited the intentions of the contracting parties that the measure of the engagements stipulated should be sufficiently exact to become immediately enforceable as municipal law, and not to require, before being made effective, any exercise of discretion or appeal to the judgment of any political authority. Indeed, in no other way was it possible, according to the views and policies of our statesmen of that day, to secure for the United States that equality and reciprocity which was the fundamental principle of our foreign relations.

It will be further observed that these treaties also contained stipulations concerning rights in times of war on land and sea of neutrals and of non-combatants, and about other matters tending in their nature to ameliorate the asperities of war, while, at the same time, they recognized the new nation in the international family with rights to control its own commercial relations with foreign powers.

(9.) These treaties also necessitated unity at home, in that they placed each of the treaty powers "in respect to commerce and navigation *within each and every State* on the footing of the most favored nation." In the case of Prussia duties upon *its* products imported into any of our States should be only as much as should be paid by the most favored nation.

(10.) These circumstances further occasioned the necessity on the part of the United States of a uniform judicial power, lest the failure of some local authority to enforce treaty stipulations might defeat our foreign policy; hence was evolved the constitutional supremacy of treaties.

The Federalist (letter No. 22) says: "A circumstance which crowns the defects of the confederation remains yet to be mentioned, the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determination. To produce uniformity in these determinations they ought to be submitted, in the last resort, to one supreme tribunal."

That this result was abundantly attained has been so frequently declared by the judiciary, and is so well recognized by all other departments of the Government, that the proposition requires no fortification before this Court. It is well expressed by Secretary of State Livingston June 3, 1833: "The Government of the United States presumes that whenever a treaty has been duly concluded and ratified by the acknowledged authorities competent for that purpose an obligation is thereby imposed upon each and every department of the Government to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observation of good faith among nations."

In the same spirit was the proclamation of the Continental Congress, dated January 14, 1784, enjoining the people with reference to the Paris treaty that "with that good faith which is every man's surest guide within their several offices, jurisdictions, and vocations they carry into effect the said definitive articles and every clause and sentence thereof."

B. (1.) It is very clear from the foregoing that during the first generation of the history of this Government two things at least were sought after with respect to our foreign commercial relations: One was the entry and departure of American vessels in all the ports and dominions of the foreign country with whom a convention was sought, upon as favorable terms as were accorded by that power to any other foreign nation, with a reciprocal equivalent concession by the United States to the vessels of the contracting country; and, secondly, the exportation of the products of the United States into the dominions of the foreign sovereign with no higher or other duties than were chargeable by that sovereign to any other foreign nation, with the equivalent reciprocal concession that the United States would not impose upon the products of dominions of the contracting power any higher or other duties or charges than were imposed on the like products of any other foreign country. It goes without saying that, in addition to these objects sought to be attained, there were the more general purposes of freedom of travel and protection of person and of property in the respective dominions of the contracting powers. These latter reciprocities of amity and of protection of person and of property in the dominions of the respective parties were in general successfully and satisfactorily introduced into all the early conventions to which the United States was a party, and were readily agreed upon in satisfactory terms between our representatives and the representatives of the powers which were willing to enter into conventions with the United States. The substantial difficulties to be overcome, however, in the treaties bearing more directly upon commerce related to the proposed equality and reciprocity in the carrying trade and to the proposed reciprocal exchange of the products and resources of the parties to a convention.

(2.) In the beginning of our history the colonial policy of European nations and their navigation laws had left to for-

eigners no other than an indirect trade with colonies through the mother countries. We sought to break through that colonial policy and to secure for our flag reciprocity and liberty to trade.

In 1782 Livingston wrote Franklin, in speaking of the subjects of discussion in negotiations with England and France:

"Two things are of great moment to us, one of which, at least, would meet with no difficulty, if France and England understood their true interests—I mean the West India trade, and the right to cut logwood and mahogany. *Without a free admission of all kinds of provisions into the islands our agriculture* will suffer extensively. This will be severely felt at first, and when it remedies itself, which it will do in time, it must be at the expense of the nations that share our commerce. *It will lessen the consumption of foreign sugars*," etc. * * * (4 Dip. Corr., p. 13.)

So when these clauses failed he wrote again (*ib.*, 13) in 1783:

"I am sorry that the commercial article is stricken out; it would have been very important to us to have got a footing at least in the British West Indies as a means of compelling France to pursue her true interest and ours by opening her ports also to us."

It was in pursuance of these views that clauses of the character in question were inserted whenever practicable.

Thus, from the inception of the Government was it our definite policy to induce the governments of Europe having colonial possessions in the West Indies to place the commercial relations between the United States and such colonial possessions upon the same footing as obtained between those powers and the United States in relation to their European territories. This effort has not yet succeeded.

(3.) *It further appears that immediately upon establishing its own unity and solidification at home and recognition abroad it was the policy of the United States to stipulate with comprehensive detail the conditions under which our foreign commerce*

*should be carried on and to fix in unequivocal terms the obligations on the one hand of the foreign power and on the other hand the municipal law of this country by which our foreign commerce should be regulated.*

As little as possible should be left uncertain. The doors opening upon political discretion should, wherever practicable, be closed. Even the engagement not to grant particular favors was an inhibitory one upon Congress or the treaty-making power rather than obligation calling for the performance on the part of this Government of some affirmative act. Whenever stipulations were necessarily dependent upon future events great care was exercised to state definite and ascertainable conditions capable of judicial cognizance and so to phrase provisions of this character that officers and courts might readily enforce them. This American idea was, in notable instances, approved by European diplomatists, as it would tend to "prevent those misunderstandings which might arise" from the use of equivocal terms. (4 Dip. Corres., pp. 210–211.)

It was for this reason that the use of the term "favored nation" in the description of stipulations of special value came to be disapproved of by the Americans. In treaties subsequent to those already mentioned with France, Netherlands, Sweden, and Prussia it is avoided wherever possible.

(4.) Thirty years before Mr. Clay elaborated upon the disadvantages of using the term "favored nation" as the measure of an engagement our Constitution founders had unostentatiously tried to eliminate it. The instructions to Minister Jay (Am. St. Pa., For. Rel., Vol. I, p. 473) were to avoid the use of the expression "favored nation" as leading to "embarrassments," and the expression, found in the *project* submitted to him by Lord Granville, in a provision exactly corresponding to article IX of the Dominican treaty, disappeared from the language as finally agreed upon. Indeed, the language of the Jay treaty (1794) so nearly corresponds

and constitutes the first precedent by which article IX of the Dominican treaty and its predecessors was framed that at the risk of space article XV of the treaty with Great Britain of 1794 is herewith printed opposite the corresponding sentences of this article IX.

ARTICLE XV.

It is agreed that *no other or* higher duties shall be paid by the ships *or merchandise* of the one party in the ports of the other than such as are paid by the like vessels *or merchandise* of *all* other nations.

Nor shall any *other or higher* duty be imposed in one country on the importation of any articles the growth, produce, or manufacture of the other *than are or shall be payable on* the importation of *the like articles* being of *the growth, produce, or manufacture of* ANY OTHER FOREIGN COUNTRY.

Nor shall any prohibition be imposed on the exportation or importation of any articles to or from the territories of the two parties respectively which shall not equally extend *to all other nations.*

ARTICLE IX.

*No higher or other duty shall be imposed* on the importation into the United States of *any article* the growth, produce, or manufacture of the Dominican Republic or of her fisheries and *no higher or other duties shall be imposed* on the importation into the Dominican Republic of *any article* the growth, produce, or manufacture of the United States or their fisheries *than are or shall be payable on the like articles the growth, produce, or manufacture of* ANY OTHER FOREIGN COUNTRY or its fisheries.

No other or higher duties or charges shall be imposed in the United States on the exportation of any article to the Dominican Republic nor in the Dominican Republic on the exportation of any article to the United States than such as are or shall be payable on the exportation of the like article to *any other* foreign country.

No prohibition, &c., in either country which shall not equally extend to *every other foreign country.*

(5.) There is no room historically for the claim that this coincidence is accidental. The wise caution thus exhibited became thereafter a fundamental principle in our diplomacy, and has been continuously observed in all practicable cases without deviation through successive administrations.

The wisdom of this course will never be assailed in the light of the prolonged discussions and grave embarrassments that have arisen between our own and foreign governments as to the meaning and application of the term "favored nation" in some treaty provisions other than those under present consideration. The claims made upon this Govern-

ment at various times have not indicated any serious diversity among European statesmen as to the significance and operation of this term, while among American publicists the opinions expressed have not always been uniform. Indeed, in the course of some controversies the United States executive authorities have been charged with treading on the edge of pretext instead of keeping within the limits of sound argument.

(6.) It is no purpose of this argument, however, to quarrel with the significance anywhere or by any authority sought to be attached to the use of the term "favored nation" in any particular treaty provision, because *in the case at bar there is no such expression to be interpreted.* It is not found in the Dominican treaty, and the only usefulness of this line of considerations consists in the more perfectly to distinguish the significance of the expressions of the stipulations otherwise stated.

(7.) For all the purposes of this case it may be conceded that the meaning of the term "favored nation," if found in the Dominican treaty, would be substantially that indicated by Mr. Justice Field in *Bartram* vs. *Robertson*, 122 *U. S. Rep.*, or, to express the argumentative concession in a more general way, upon the authority of Mr. Gallatin (February 27, 1823):

"The United States contend that the right to be treated upon the footing of the most favored nation *when not otherwise defined* and when *expressed only in those words* is that and can only be that of being entitled to that treatment gratuitously, if such nation enjoys it gratuitously, and on paying the same equivalent if it has been granted in consideration of an equivalent."

The expression, therefore, of being placed on "the footing of the most favored nation" was phrased with reference to a claim based exclusively upon the right to be so treated as the result of a general clause "*expressed only in those words,*"

and was not addressed to any defined specification relating to no other or higher duties. Claims for lower imposts resting exclusively upon a specific clause like that now before this Court have seldom occurred. Whatever differences of opinion diplomatic correspondence may exhibit that apparently pertain to this issue will be found upon examination to have proceeded from the consideration of those general clauses and not from unqualified special stipulations, such as that under consideration.

(8.) For the sake of argument, however, and indeed for all the purposes of this case, it might, without disturbing the contentions otherwise made in behalf of the plaintiffs in error, be conceded (although such concession is unnecessary) that Mr. Gallatin has correctly stated the meaning of a general favored-nation clause. Under this view there must be some sound reason, and not accident, to explain why such a general favored-nation clause is so little relied upon, and, indeed, frequently omitted in our treaties since 1815, and is carefully kept out of the present Dominican treaty.

C. A new chapter in American diplomacy may be said to begin with the convention of 1815 with Great Britain. The negotiations concluded by this convention "secured national treatment for our vessels; equal terms for cargoes, whether imported or exported in the United States or English ships; *equal import duties on the produce of the United States as on like articles the produce of other foreign nations*," although intercourse between the two nations was restricted to the products of either or, in other words, to the direct trade. In respect to the ground actually covered by this convention, however, the principles covered by the treaty and the phrases used to secure their adequate application to affairs expose in no uncertain manner the conditions and regulations which American statesmen sought to apply to all our intercourse with foreign nations. It was not until many years afterwards

that these principles became embodied in other treaties, and, indeed, to this day they are not applied in some of our existing conventions.

The influence of the policy and its achievements attending our negotiations with Great Britain at this period upon our subsequent diplomatic relations justify the following extract from a paper of Mr. Adams by way of further description:

"By the convention of July 3, 1815, the commercial intercourse between the United States and the British territories in Europe was placed, in relation to navigation and revenue, on the following footing:

"1st. No other or higher duties on *importation* are to be imposed in either country on any articles the *growth, produce, or manufacture* of the other than are payable on the *like articles* being the growth, produce, or manufacture of *any other foreign country.*

"2d. No higher or other *duties or charges* on *exportation* are to be imposed on any article exported to the two countries, respectively, than are payable on the exportation of the like articles *to* any other *foreign* country.

"3d. No prohibition on exportation or importation of articles the growth, produce, or manufacture of either country to the other which shall not equally extend to all other nations.

"4th. No higher or other *duties* or charges to be imposed in the ports of either party upon the *vessels* of the other than upon its own.

"5th. The *same* duties to be paid on the importation of articles the growth, produce, or manufacture of either country into the ports of the other, whether imported in the vessels of the United States or of Great Britain.

"6th. The same duties to be paid and the same *bounties* allowed on the *exportation* of articles the growth, produce, or manufacture of either country to the other, whether exported in British or American vessels; and,

"7th. In cases of drawback, respectively, the amount of drawback to be the same, whether the goods exported were *originally imported* in a British or an American vessel.

"8th. Reservation of rights in re-exportation to a foreign country to regulate drawbacks.

"9th. West India intercourse with the United States not to be affected by any of these provisions, but 'each party to remain in complete possession of its rights with reference to such intercourse.'" (6 Am. St. Pa., For. Rel., p. 223, dated June 23rd, 1823.)

It is noteworthy that at the head of this epitome, and estimated as of the first importance, is the provision for *equalization of duties upon all similar products*, a provision corresponding with the terms of article IX of the Dominican treaty.

When Secretary Monroe wrote, April 15, 1815, that "The treaties between the United States and some of the powers of Europe having been annulled by causes proceeding from the state of Europe for some time past and other treaties having expired, the United States have now to form their system of commercial intercourse with every power, as it were, at the same time," it is manifest that the system of commercial intercourse in contemplation was to be established upon the principles covered in Mr. Adams' foregoing digest. Secretary Fish thus more briefly epitomizes: "Reciprocity and equalization to be achieved by legislation were at that time the American solution of perfect commercial relations between the two nations." (See his letter April 9, 1873, For. Rel., part 2, 725.)

The first treaty, however, establishing the United States policy of reciprocity not only in respect of vessels, but as to *cargoes* and extending in its operations to all the dominions of the treaty powers wherever situated, was in 1825. The treaty with the Central American Republic of that year reduced the new departure in American diplomacy to a comprehensive formal basis and furnished the outlines and ground-work for all the future efforts of the treaty-making power of the United States.

## X.

The meaning or application of article 5 of this treaty has never been questioned and is abundantly explained by history and contemporaneous declarations. The correspondence between article 5 of the Central American treaty and article 9 of the Dominican treaty is worthy of exhibition by the following parallel:

ARTICLE 5. *Central American.*

No higher or other duties shall be imposed on the importation into the United States of any articles the produce or manufactures of the Federation of the Center of America, and no higher or other duties shall be imposed on the importation into the Federation of the Center of America of any articles the produce or manufactures of the United States than are or shall be payable on the like articles being the produce or manufacture of *any other* foreign country.

(Then follows a similar clause as to exportations.)

Nor shall any prohibition be imposed, etc., etc., etc., as to exportations or importations in either country "which shall not *equally extend to all other nations.*"

ARTICLE 9. *Dominican.*

No higher or other duty shall be imposed on the importation into the United States of any article the growth, etc., of Dominican Republic, * * * and no higher or other duty * * * upon the importation into the Dominican Republic of any article the growth, etc., of the United States than are or shall be payable on the *like articles* the growth, etc., of *any other* foreign country. * * *

(Then follows a similar clause as to exportations.)

No prohibition, etc., as to imports from or to either county "which shall not equally extend to *every other* foreign country."

The statement that the earlier article above quoted was the ground-work not only for the article of the Dominican treaty under consideration, but for all similar provisions found in various forms in treaties which the United States have made with some of the foreign powers, should not, in the light of history, require any fortification before this Court. It may be convenient, however, to embody here some notable authorities other than a comparison of phrases, observing, however, at the same time, that the provision does not exist in existing treaties between the United States and some of the great powers, with whom its advantages are yet to be secured (France and Spain).

(1.) Referring to what had been the effort of the United States in earlier times, Mr. Clay wrote to Mr. Gallatin, in 1824, that what the United States had contended for and on what the parties could not then agree was that American produce "should be admitted into the British colonial ports upon the same terms as similar produce from *anywhere else*"—that is, from a British possession or *any foreign country*. (6 Am. St. Pa., For. Rel., p. 261.) Referring to what he had accomplished in his treaty with Central America and what he desired to accomplish in the treaties for which it was to be the basis, Mr. Clay, two years afterwards, wrote to Mr. Gallatin, June 19, 1826 (*ibid.*, p. 248), as follows: "Your discussion on this subject (colonial trade) may take such a direction as to present a favorable occasion for testing the extent to which the British government is disposed to carry the most liberal commercial doctrine each professes as proclaimed to the world. With that view and for settling at once all claims on the question whether the vessels of the United States shall be permitted to engage in the trade between the British colonies and foreign countries, you are hereby authorized to propose, as a general regulation, applicable to the British dominions in Europe as well as in this hemisphere, or wherever situated, that whatever can be lawfully imported into one country in its own vessels may be also imported into it in the vessels of the other country, the vessel and the cargo being in both instances the same and *no higher or other duties*. This will leave the capital and industry of the two nations concerned in navigation to a free competition upon equal terms, and that is understood to be the policy which the British government has recently announced. On this broad and extensive principle a treaty with the Republic of the Center of America was concluded on the 6th of December last, and was subsequently ratified by the President, with the advice and consent of the Senate, it is believed, given unanimously. We have not yet heard of its ratification by the other power, and, of

course, its promulgation at present would be premature, but a copy of it is now placed in your possession. A treaty with Denmark, embracing the same principles under some modifications and limitations, was signed at Washington on the 26th of April, the present year, to the ratification of which the Senate has also consented and advised with equal unanimity. Sufficient time has not yet elapsed to receive the Danish ratification, but a copy of this treaty is also confided to you. If Great Britain will assent to neither principle, if she insist upon engrossing the whole trade, not only between her colonies and the European dominions, but also between those colonies and foreign countries, to the exclusion from both of the navigation of the United States, it will then be necessary to insert a clause in the convention expressly reserving to each party the right, by existing or other laws, to restrict trade between the United States and the British colonies to the direct intercourse between them."

That the subject of equalization of duties on importations of similar productions from any foreign place was an important and active factor in all of the negotiations of these periods is further evinced by an extract from Sixteenth British Protocol of 1824, reading:

"That upon vessels of Great Britain and of her colonies admitted by law into all and every one of the ports of the United States, and upon any goods, wares, or merchandise lawfully imported in the said vessels, no higher or other duties of tonnage or import and no charges of any kind shall be levied or exacted than upon vessels of the United States, including all vessels of each and every one of the said States, *or upon like goods, wares, or merchandise imported into the United States from any other* foreign port or place whatever." (6 Am. St. Pa., p. 242.)

Referring to the Central American treaty and the first European treaty (Denmark), which had been founded upon it, President John Quincy Adams gave special emphasis, in

his message of December 5, 1826, and drew particular attention to the distinction between the absolute stipulation of *no higher duties* than those imposed on *similar importations* from *any other foreign* country and a stipulation dependent upon a favored nation. He said:

"These treaties have established between the contracting parties the principles of equality and reciprocity in their broad and most liberal extent, each party admitting the vessels of the other into its ports laden with cagoes of produce and manufactures of any country of the globe upon the payment of the same duties of tonnage and import that are chargeable on our own. They have further stipulated that parties shall hereafter grant no favor of navigation or commerce to any nation which shall not upon the same terms be granted to each other (*i. e.*, a political grant); *and* that neither party will impose upon articles of merchandise, the produce or manufacture of the other, *any other or higher duties* than upon the like articles being the produce or manufacture *of any other country.*"

To these principles Denmark excepts a colony in the Arctic seas, but not her West Indies.

In the whole history of American politics no party, no statesman, has quarreled with this exposition or the policy it describes. In 1829 Mr. Van Buren instructed Minister McLane, at London, in this language:

"The policy of the United States in relation to their commercial intercourse with other nations is founded on principles of perfect equality and reciprocity. By the adoption of these principles they have endeavored to relieve themselves from the discussions, discontents, and embarrassments inseparable from the imposition of burdensome discriminations. These principles were avowed when they were yet struggling for their independence, are recorded in the first treaty, and have been adhered to with the most scrupulous fidelity."

Secretary Howell Cobb, June 16, 1860, approvingly quotes this language (House of Rep. Ex. Doc. 96, 36th Congress, 1st session).

(2.) That the meaning to be given to the article in question is exactly as contended for by plaintiffs in error in the case at the bar, and no other, is further obvious by an inspection of the next important European treaty made under the auspices of Mr. Clay. In the British treaty of 1828 (see its articles 2, 3, 4, 5, and 6), establishing absolute equalization and reciprocity of commerce and navigation, as well as duties of any kind, both on vessels and cargoes, the engagements are not dependent on any favor that has been or shall be granted to any other nation. On the contrary, the important engagements in these respects are dependent exclusively upon the absolute conditions specified. If this were not so, the care and particularity of the details covered by these articles were spent in vain, and there would be no reason or propriety in the strenuous adherence to the basis upon which the negotiations were consummated. Any other rule of interpretation and operation of those articles than such a rule as is contended for in this argument would, in fact, abrogate the treaty or, at all events, render it absolutely valueless in the light of Mr. Clay's instructions and the expressions of the statesman under whose auspices it was attained.

By this time the sagacious distinctions pointed out by Mr. Madison in 1792 had attained some fruition in our struggling diplomacy.

## XI.

### *Instances of Diplomatic Differences.*

(1.) One of the earliest controversies in our history arising under any favored nation clause of a treaty occurred in the claim made by France under the 8th article of the treaty ceding Louisiana to the United States (1803), which stipulated for the ships of France treatment in the ports of the United States "upon the footing of the most favored nations." France claimed for its vessels in Louisana ports all the advantages that were granted to the English nation in

all ports of the United States. This claim gave rise to a long and serious contention in which the views of the French representatives as to what was meant by treatment on the "footing of the most favored nations" were directly at variance with the construction given to that clause by the representatives of this country. Whatever may be the merits of these respective contentions, the noteworthy fact in this connection is that no agreement upon the subject was reached, and the historical difference between European statesmen and American statesmen remains.

The controversy was only adjusted by a new treaty, and therefore neither party yielded anything in argument.

In the course of this controversy Secretary John Quincy Adams, December 23rd, 1817, wrote: French vessels "are treated in the ports of Louisiana upon the footing of the most favored nation; and that neither the English nor any other foreign nation enjoys gratuitous advantage there which is not equally enjoyed by France." But English vessels are admitted upon the payment of the same duties as United States vessels, on condition that United States vessels shall likewise be admitted into Great Britain. The 8th article stipulates for ships of France treatment upon the "footing of the most favored nations." But it does not say, and cannot be understood to mean, that France should enjoy as a free gift that which is conceded to the United States for a full equivalent. The argument is then continued at length in this strain, and the assurance given that "French vessels shall enjoy gratuitously every favor indulged gratuitously to others, and every additional favor upon the reciprocation of the same to vessels of the United States in France."

To all this De Neuville replies at length, arguing "that they (vessels) shall undoubtedly and positively be treated upon the footing of the most favored nation, and it makes no difference whether that treatment be the consequence of a *gratuitous* or a *conditional* concession; the article has no restriction." To require further equivalent is to require France to pay twice. (5th Am. St. Pa., 2nd Series, p. 641, 642.)

Mr. Adams' idea was that "English vessels pay there (Louisiana) no higher or other duties than our own; not by *favor*, but by bargain" (5th Am. St. Pa., For. Rel., p. 646). Even this argument would not apply to the case at bar, inasmuch as the *Dominican treaty in controversy contains no engagement whatever dependent upon the footing of any favored nation.*

The French representative, however, forcibly summons Vattel as an authority for his construction, in the following extract (Vattel, Book 2, ch. 26, p. 283): "We do not presume that sensible persons had anything in view in treating together or in forming any other serious agreement. The interpretation which renders a treaty null and without effect cannot, then, be admitted. Every clause should be interpreted in such a manner as that it may have *its effect* and not be found vain and illusive."

2. In the French treaty of 1822, by which the foregoing controversy was allayed, there was a stipulation that French vessels coming from France and laden with the produce of France should be "exempt from all duties but those for which it provided." The good faith of this Government, as well as the meaning of a specific stipulation touching duties, is illustrated by the action of Secretary of State Clay upon the claim of France for restitution of duties claimed to have been exacted in violation of this treaty. In 1827, March 20, Mr. Clay declared that the exemption stipulated for was not lost because such vessels touched at colonial dependencies of France, and the duties were ordered to be refunded. He said: "To entitle vessels of the two countries reciprocally to the rate of duties which the convention stipulates, all that is necessary is that their cargoes shall consist of articles of the growth, produce, or manufacture of those countries respectively." (So in the case at bar plaintiffs in error claim that all that is necessary is that the cargoes should be *like* articles the products of the treaty country, corresponding to

articles exempted by law from duty.) So Mr. Clay declared that an American vessel did not lose the benefit of the treaty stipulation by touching at a British port. Hence, in such a case, Mr. Clay made the claim on France for a refund of the duties which had been exacted, saying that some other mode must be devised to prevent fraudulent practices not authorized by the convention than the mode of subjecting the cargo "to a higher rate of duty" than the terms of the convention warranted. (6th Am. St. Pa., For. Rel., p. 828, 829.)

Thus, in the case at bar, some other mode must be devised to place a duty on molasses from Dominica (in the absence of any effective statute) than to subject it to a higher duty than exactly stipulated for in the particular event contemplated by the treaty engagement, to wit, a low duty upon or exemption for molasses when imported from another country—Hawaii.

Mr. Clay declared: "The policy which this Government has hitherto advanced has been to reserve to itself exclusively the judgment of the proper rate of those duties. In fixing it the equality has been alike dispensed to all nations." (*Ib.*, p. 379.)

If, by reason of special circumstances, particular products from particular places are made particularly exempt from duty, such exemption is the only *equality* that is possible to be dispensed to all other nations who have contracted to secure it.

3. Several instances more or less important may be mentioned where a treaty provision similar to that under consideration in this case has been made the subject of executive or diplomatic action.

In 1882 Acting Secretary of State John Davis instructed American Minister Wallace at Constantinople that the additional petroleum duty which had been there established was against the treaty between Turkey and the United States of 1862, which provided that no other or higher duties than

those there stated should be imposed, and that the action, therefore, of the foreign power was against the acknowledged principles of international law and comity. (1883, For. Rel., page 520.)

4. In 1879 Minister Kasson wrote from Austria:

"The effect of the most favored nation principle often surprises the merchant who thinks himself interested in a commercial treaty between two foreign Governments—*e. g.*, the new treaty between Austria and Italy is understood to secure on Austrian steel the same duty as on iron. This effects a reduction of some nine francs per quintal on the Italian general tariff rates on steel, and this, it would seem, under our treaty with Italy, *inures to the benefit also of American manufactures of steel.*"

The treaty between the United States and Italy provided for no other or higher duties than are paid on like products of any other foreign nation. Precisely such effects as are indicated by Mr. Kasson evince the purpose of this country in procuring such treaty stipulations. It was their original purpose and effect.

5. The following is a case involving principles similar in their application to those contended for in the case at bar. In October, 1872, Sweden claimed exemption of its steamers engaged in "regular navigation" between Sweden and the United States from tonnage duties, because by article 4 of the treaty between the United States and Belgium of 1858 it was stipulated: "Steam vessels of the United States and Belgium engaged in regular navigation between the United States and Belgium should be exempt in both countries from the payment of duties of tonnage, anchorage, buoys, and lighthouses." Here was a specific stipulation for exemptions in certain events, namely, the establishment of steamers engaged in "regular navigation." The claim of Sweden was founded on article 8 of its treaty with the United States of 1827, engaging "not to impose upon the navigation between

their respective territories in the vessels of either any tonnage or other duties of any kind or denomination which shall be *higher or other* than those which shall be imposed on every other navigation." Moreover, this treaty of 1827 revived the favored-nation provisions and other articles in the old treaty of 1783, recited earlier in this argument. The Swedish minister said, March 25th, 1874: "It seems very difficult not to admit that there is thus secured for each other's vessels the usage of the most favored nation in everything relating to tonnage or other duties" (For. Rel., 1874, p. 1118). "It seems to me impossible, Mr. Secretary of State, to find in a treaty terms more explicit and bearing more directly upon questions of the nature of that which now occupies our attention;" and he urges the claim "upon these direct and formal terms of existing treaties." After reference by the Secretary of State to the Treasury Department, the latter had expressed the opinion that the treaty between Sweden and the United States of 1827 contained no stipulation to sustain the claim, and if this decision was considered "unjust, the parties interested might appeal to the courts."

Without such recourse, however (such as the parties in this case have sought to invoke to compel the United States to act up to its treaty stipulations by enforcing them as municipal law in a case nominally between private parties), Sweden, in that instance, again applied to the State Department. On further consideration of the matter then, the Secretary of State, October 13, 1874, wrote the Swedish minister, saying that the Secretary of the Treasury had re-examined the matter, and that, after "a mature consideration of the whole question, he (Secretary of State) was prepared to admit the claim," assuming that United States vessels will receive similar exemptions in Sweden and Norway that the vessels of the latter did in the United States.

This was the only honorable course which the United States, under its obligation, could, indeed, pursue. That it was not for some reason in accord, however, with the wishes

and exigencies of the time may be assumed from the circumstance that, by direction of Congress, notice was given (1875) to terminate the Belgian treaty.

5. In article 30 of the treaty between the United States and China of 1844 there was a provision whereby China engaged that if it should at any time grant to any nation "any right, privilege, or favor connected either with navigation, commerce, political or other intercourse, which is not conferred by this treaty, such right, privilege, and favor shall at once freely inure to the benefit of the United States, its public officers, merchants, and citizens." By letter from the American representative in China to our State Department, bearing date January 31, 1866, he announced that as the tonnage dues on vessels from Russia into Chinese ports had recently by law been made the same as such vessels paid on entering the Japanese ports the United States receive the benefit of this reduction through the foregoing treaty provision in their treaty with China—that is to say, the reduction because of the foregoing treaty provision immediately inured to the benefit of the United States.

6. In another instance, in May, 1871, when a claim was made by Colombia for certain rights by reason of the treaty between the United States and New Grenada it was replied that if, in the opinion of Colombia, the Executive of the United States had given a construction incompatible with the provisions of the treaty obligations by imposing excessive duties, the merchants of Colombia might, "on proper application to the courts of the United States, have their rights under the treaty vindicated." (1871, For. Rel., p. 248.)

7. In 1877 the Department of State made claim that Russia by a new tariff was discriminating in favor of certain articles by land over similar articles by sea. Assistant Secretary Seward wrote to the American minister that, while it

was agreeable to note that the cause of the complaint had in some respects been removed, some discriminations yet remained. This he regarded "as a direct violation of that part of the article of the treaty which stipulated that 'no other or higher duties should be imposed on the importation into the Empire of Russia of any article the product or manufacture of the United States than are or shall be payable on the like article being the product or manufacture of any other foreign country.' It seems clear that this stipulation was not meant to reserve to Russia the privilege of charging a less duty upon importations by land than upon those by sea. The smaller duty required by the tariff upon an article carried by land plainly has the effect of a bounty upon importations from countries conterminous with Russia. This discrimination may not be important, perhaps. * * * It involves a principle, however, and a construction of the treaty upon which we must insist." (1877, For. Rel., p. 751.)

In that instance our Government made a broader claim upon the stipulation now under inquiry than is made by the plaintiffs in the case at bar. The illustration, however, fortifies the inevitable and exclusive construction of the treaty clause by giving it activity and immediate application upon the occurrence of the precise event described in the stipulation, viz., a special duty upon or exemption for like articles from *any other country*.

8. One further illustration: Prior to the treaty of 1875 between the United States and Hawaii there existed a treaty between Hawaii and Great Britain, which contained the two provisions that are distinguished from each other in an earlier part of this argument—namely, a provision under article 3 corresponding to the general favored-nation clause hereinbefore quoted, and a provision in articles 4 and 5 that no other or higher duty should be payable on articles from Great Britain than were paid on the same article the growth of any other country. In 1878 Great Britain claimed in

Hawaii the same treatment for its goods as was "accorded to similar goods of American origin." The Hawaiian authorities, through Mr. Carter, interpreted these clauses as not applying except on the same compensations as had been stipulated for in the treaty between Hawaii and the United States. Great Britain would not accede to any such doctrine and has never yielded, although by a rearrangement of the Hawaiian tariff, with the expressed approval of England after negotiation, the differences were composed. While the controversy was active, however, the demands of the British government and the instructions, opinions, and line of argument pursued in support thereof by Lord Derby and his coadjutors are clear and unequivocal. The position insisted upon was in substance that the stipulation for no other or higher duty upon British goods than were payable upon the same or similar goods from any other country was a stipulation to take effect upon the happening of a certain event—namely, the duty payable on like products from any other country—and independent of any considerations resulting from the favored-nation clause in the treaty or any other treaty provision the engagement was an absolute one, having no reference to favor, consideration, or compensation. The supposed equivalents or motives producing exemptions or low duties on the products of any other nation had no relation to the obligation that was absolute or unqualified. The gravity of this claim to the Hawaiian interests was such as to produce a special mission of its representatives to London with a view to avoid it. Failing to allay the matter in any other way, however, the result was arrived at that the Hawaiian government should make a new tariff acceptable to the English interests and leave the claims for refunds upon the Hawaiian government by reason of the alleged violation of treaty prior to such new tariff to be disposed of in future. These refunds proved to be too inconsiderable to be of practicable consequence, although it was in respect to the principle which might be involved should the Hawaiian

government yield the claim that American interests have obstructed them with the apparent approval of this Government.

It was during this controversy that the Hawaiian government gave formal notice of the determination of article 4 of its treaty with England, and a serious political difference resulted in Hawaiian politics, one party favoring the English demands and another regretfully conceding the cogency of arguments to support them.

The embarrassments to the Hawaiian government were at the same time further increased by a similar demand made by the German Empire by reason of its treaties with Hawaii. The commission to London was extended to Germany. With that government no composition seems to have been possible except by a thorough revision of the treaty relations between the two countries. A new treaty was, therefore, made with the German Empire, in which, to prevent the possibility in the future of the claim otherwise unavoidable, it was stipulated:

"Certain relations of proximity and other considerations having rendered it important to the Hawaiian government to enter into a new agreement with the Government of the United States of America by a convention concluded at Washington, January 30th, 1875, the two high contracting parties have agreed that the special advantages granted by said convention to the United States of America in consideration of equivalent advantages shall not in any case be invoked in favor of the relations sanctioned between the two high contracting parties by the present treaty."

This stipulation was incorporated in the new treaty of September 19th, 1879, between Hawaii and the German Empire.

Afterwards the Hawaiian government made a treaty with Portugal containing a like declaration.

When the British commissioner made his demand upon the Hawaiian government for exemptions of British products he expressly stated that the British government did

not propose to give any equivalent or compensation for the enjoyment of the rights demanded. (1877, For. Rel., p 297.)

These rights were founded upon the treaty obligation stipulating absolutely for no other or higher duties upon British products than should be at any time payable on like products of any other country. The event or condition mentioned in this stipulation occurred when the Hawaiian government, by an act of its legislature, exempted from duty certain articles of American exportation described in the schedule contained in the enactment. That exemption gave rise to Lord Derby's contention, and England has never receded from that position.

## XII.

The Hawaiian treaty with the United States expressly provided for legislation without which its effect was at least doubtful. It prescribed that certain legislation should be had by the Congress of the United States. So far as the exemptions from United States duty on importations from Hawaii were concerned, those exemptions were accomplished by an act of Congress approved August 15, 1876. It was *not the treaty in this case which exempted Hawaiian products from duty on coming into the United States. It was an act of Congress.* Hawaiian products can claim no exemption and are entitled to no exemption, except by virtue of the act of Congress. It is this act of Congress of August 15, 1876 (19 Stat., 200), which section 11 of the tariff of 1883 declares shall remain in full force and effect. So far as the duty or exemptions from duty or as the condition or event upon which the duty or exemption from duty of the Dominican or any other products are concerned, the importation of any product from Hawaii or from the Dominican Republic is governed exclusively, first, by the Dominican treaty of 1867; second, by the exemption under the act of Congress of 1876; third, by the reservations from imposts described in section 11, act of March 3, 1883.

## XIII.

From the foregoing review it is clear that whatever differences of opinion have arisen in the construction or application of a treaty provision by which the parties "engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation," which shall not immediately become common to the other party, freely if the concession was freely made, or on allowing the same compensation if the concession was conditional, no differences have been found in the literature of the subject regarding the meaning and operation of *specific stipulations* touching charges upon ships or imposts upon cargoes. The latter subjects will be found, in all the treaties which the United States have concluded during the present century, to have been treated with careful specifications independent of any *favor* to any other nation. almost In all existing treaties between the United States and foreign powers the stipulations respecting imposts have been made unconditional and absolute and without any dependence for their validity and operation upon the obligations to a *favored* nation. The traditional injunctions to avoid the use of the term "favored nation" by substituting for it terms of exact description wherever possible seems to have been scrupulously observed by all of our treaty-makers.

A distinguished illustration of this exactness in phraseology, in place of description by reference to a favored nation, may be found in article 1 of the treaty with the Ottoman Empire, 1862, where it was stipulated "that all rights, privileges, or immunities which the Sublime Porte now grants or may hereafter grant to or suffer to be enjoyed by the subjects, ships, commerce, or navigation of any other foreign power shall be equally granted to and exercised and enjoyed by the citizens, vessels, commerce, and navigation of the United States of America." Suppose that this stipula-

tion with such a power as Turkey had been so phrased as to read, instead of the words "of any other foreign power," "of any nation the most favored." What would have been the practical value of the provision to the United States under the multifarious "equivalents" and "compensations" that attend the relations of other powers with Turkey? Its chief value might prove an easy road for the United States to follow to European politics and warfare; a value not hitherto appreciated by American statesmen.

## XIV.

It is not difficult to perceive that the distinction between treaty obligations phrased in terms of adequate and absolute description and treaty obligations conditional upon the vague and indefinite description conveyed by the term "favored nation" was a fundamental and practical distinction essential to the accomplishment of the equality and reciprocity treaty policy; nor was it possible to unify treaty obligations into the administration of the municipal law of this country, as provided for by the United States Constitution, if the courts could not seize upon the language of the law and give it, through the ordinary and recognized principles of construction and interpretation, juridical efficiency and exact application to affairs.

In this aspect, therefore, the various provisions in United States treaties stipulating for specific rights sometimes reciprocal and sometimes apparently not reciprocal, with respect to the rights of United States ships in specified places, their exemption or subjection to dues or charges of various characters, the rights of cargoes in national ships, or of certain kinds of cargoes in any ships, or the exemption or subjection to duty of special classes of cargoes, denoted by terms of adequate description in the treaty phrases, have established what may be called, for the purpose of municipal law, a code, perfect, complete, and adequate for all classes covered by the language of

such a code. When that code, therefore, uses language directing that upon a certain definite state of facts, capable in their nature of being judicially ascertained, the law "shall be" to this or to that effect, the duty of the courts is simple and conspicuous. The facts being without dispute, the mandate of the law "shall be" applied to them.

If, in the investigation of the facts upon which a treaty obligation depended, it became necessary, however, to ascertain whether a *favor* to any nation existed, and, if so, whether it was a favor by gratuity or for some equivalent, it is manifest that the inquiry, to say the least, would be a very intricate and difficult one for a judicial atmosphere. It would seem that such an inquiry involves considerations of an international or political character, and in any form of government, and particularly in the government of a constitutional republic, such an inquiry should belong to the political authority. This may be the explanation of the peculiar phraseology found in the treaty provisions engaging "mutually not to grant any particular favor to other nations," except that they shall become common. Such a provision sounds inhibitory in its character, and would seem to be addressed to the executive, legislative, or treaty-making departments of the government, and to intend to prevent future treaties, legislation, or the exercise of executive discretion, except under the possible treaty penalty, that the advantages, if any, of such action shall inure to the benefit of the parties to such an engagement. Treaty obligations, on the other hand, in nowise conditional upon political discretion, incapable from their place in the municipal code of the country of being violated with the sanction of the judicial department, seem in their nature to address themselves directly to persons and to property, and to the relations of each to the other in the eye of the law, and hence such treaty provisions seem to come peculiarly within the province of the courts. Through the courts they may be given

their deserved potency upon all other departments of the Government.

As an instance, however, where the executive department has directly applied a treaty obligation exclusively conditional upon *favors* to other nations, the following recent instance may be cited:

Under Revised Statute, sections 4219–4227, certain tonnage dues had been collected, it was claimed, in violation of treaty provisions. Section 4227 provides that "the statutes imposing tonnage duties shall not be deemed to impair any rights and privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States. By article 9 of the treaty of 1827 with the Hanseatic Republic it was provided that 'any grant of a particular favor to other nations by one of the contracting parties should immediately become common to the other party, who should enjoy the same freely if the concession was freely made or on allowing the same compensation if the concession was conditional,' and by article 4 of the treaty of 1858 with Belgium it was provided that 'steam vessels of the United States and of Belgium, engaged in regular navigation between the United States and Belgium, shall be exempt in both countries from the payment of duties of tonnage, anchorage, buoys, and light-houses.' *This concession to Belgium would inure to the benefit of the Hanseatic Republics under article 9 of the treaty with them.*" (See letter of Assistant Secretary I. H. Maynard, dated July 27, 1887, to Mr. G. O. Glavis.) The simple character of the facts in that case rendered the duty of the executive department a simple one. Moreover, its opinion, as above expressed, was in conformity with a similar legislative expression.

On the other hand, some of the difficulties that might attend judicial inquiry into the facts whether a favor existed, and, if so, whether the favor was a gratuity or a grant for some concession or equivalent in return, may be illustrated by another item from the history of the operation of the Ha-

waiian treaty with the United States. Pursuant to that treaty the Hawaiian legislature passed an act exempting from duty importations into the Kingdom of Hawaii from the United States of the articles enumerated in a schedule contained in such enactment, which articles corresponded with those enumerated in a schedule incorporated in the treaty. Among those articles were rice and sugar, refined and unrefined The exemption from duty in the Kingdom of Hawaii of these articles might, therefore, properly be treated as part of the equivalents or compensations yielded to the United States for its concessions of exemption to Hawaiian products. Should a judicial inquiry be instituted in the United States to ascertain what equivalents there were actually being received for the United States concessions a difficulty would at once arise upon discovery of the fact that by existing legislation in Hawaii, under a general enactment made several years subsequent to the United States treaty, a heavy duty of two and one-half cents a pound is imposed on rice, &c., and two and one-half cents a pound on sugars. If, therefore, any judicial action could be grounded more or less upon the existence or non-existence of "compensations," "considerations," or "equivalents," the answer would be that by the law of the Kingdom of Hawaii the considerations or equivalents stipulated for in its obligations to the United States did not exist. It is true that the enactment of the Hawaiian legislature is attempted to be explained, by Hawaiian politicians and in diplomatic correspondence, by the assurance that this heavy duty (under the Hawaiian statute, ch. 34, Laws of 1880, Compiled Laws of the Hawaiian Kingdom, p. 142) was intended to be prohibitory, and to put a stop to the alleged fraudulent practices of shipping Chinese rice and Japanese sugar into the United States by way of the Sandwich Islands, and thereby securing its admission and exemption from duty as if the product or manufacture of Hawaii. The open sea of inquiry as to the existence or non-existence of an "equivalent" as measuring any alleged

reciprocity for a treaty exemption might prove dangerous and unnavigable for the judicial pilot. It has already proved itself turbulent for political and diplomatic voyagers.

While to this it may be responded that the reciprocal concessions, equivalents, or so-called reciprocities must be manifest exclusively upon the face of the treaties and not be sought for *aliunde*, it needs no argument to demonstrate that the reciprocities of an international compact are in truth exhibited by the reciprocal *obligations* therein expressed.

It cannot with any propriety be said that one treaty is reciprocal in its terms while another treaty is without reciprocity, unless the compact be of that character where the stipulations are obligations exclusively of *one* of the contracting parties. It is enough to say that the United States have no such treaties. All of its treaties are of a reciprocal character. Each and all contain mutual engagements. Reciprocity is their distinguishing characteristic. It is as much a misnomer as a popular delusion to distinguish one treaty from another as a reciprocity treaty. In measuring the expediency or policy of negotiating, continuing, or denouncing a treaty, statesmen, negotiators, and politicians naturally debate and consider whether upon public grounds there exists as to the international relations under particular advisement that adequate and satisfactory *degree* of reciprocity which the interests of the country require. It is in this view, then, that, in popular parlance, reciprocity may or may not attend a treaty. Surely it will not and cannot with any propriety be argued to the courts that any United States treaty brought under judicial cognizance is without reciprocity.

Commonly speaking, the imperfect and unsatisfactory treaty between the United States and Canada and the contention-breeding treaty between the United States and Hawaii have been carelessly described as reciprocity treaties, because in them is found a limited enumeration of imports and exports. Some of our treaties with China contain careful and elaborate tariffs, comprising a multitude of enumerations relating to

exports from China coincident with reciprocal engagements to China and her subjects on the part of the United States. Is not such a treaty one of reciprocity? The actual reciprocity, either in the old Canadian treaty or in the troublesome Hawaiian treaty, is not in any equitable and meritorious sense found in the few lines enumerating a limited choice of commercial commodities, but is found in the general reciprocal obligations as expressed in all existing treaties between the treaty powers. Who shall say that in the so-called Canadian reciprocity treaty the agreement respecting certain rights of fishery and the reference of certain disputes therein mentioned to commissioners, rights of navigation in the St. Lawrence and adjacent waters, may not have been more substantial "equivalents" for one or the other of the contracting parties than the exchange of exemptions from duty of twenty-eight possible enumerated commodities of import and export? Who shall say that the agreement on the part of Hawaii to admit into its ports a scheduled list of American products was more or was less a motive for the reciprocal engagements on the part of the United States than was the Hawaiian engagement not to make a similar treaty with any other nation or to dispose of any part of its dominions while the treaty with the United States remained in force?

## XV.

*It is no part of the judicial office to inquire into the adequacy and motive of the consideration for any treaty obligation on the part of the United States. What the United States has on its part engaged to perform it is the duty of the judiciary to enforce.*

In a judicial sense as well as in a strictly legal sense—and, it may with great propriety be urged, in a political sense—all treaties containing mutual engagements are reciprocity treaties. Pre-eminently *every treaty of the United States is fashioned upon all the equality the United States can secure abroad in*

*return for the uniformity and equality it can in reciprocity furnish at home.*

In a political and historic sense the Hawaiian and the Canadian treaties have been spoken of as treaties of reciprocity, and thereby they have become popularly distinguished from other treaties. For all the purposes of municipal administration through the executive department and by the power and functions of the courts, there is no more reciprocity to be invoked for one treaty than there is for another. Indeed, in a political sense, as well as by judicial inspection of its engagements, the treaty between the United States and the Dominican Republic is strictly a treaty of reciprocity. The specific subjects upon which it treats, covering, as it does, engagements elaborately detailed in thirty-two articles, relate with great particularity both to peace and to possible war, the rights of navigation of ships at home and at sea, their cargoes and authentication, their possible capture, the extradition of criminals, the rights of residence and disposal of private property in the territories of the respective parties, the terms upon which trade and commerce may be directly carried on—all significant of an intention on the part of the United States to secure a valuable friendship in a part of the world where, at the time this treaty was negotiated, it was highly important for the United States to secure such footing. On the other hand, the reciprocal obligations stipulated on the part of the United States a variety of specific rights relating to persons, property, and products pertaining to Dominican interests, and altogether evince not only the absolute and unconditional promises for which the United States pledged its faith in aid of a new republic, but the traditional equality and reciprocity which has uniformly been included in the price paid by the United States for whatever of equality and reciprocity United States treaties have secured abroad.

Under these considerations, if there were found in the Dominican treaty, instead of its Article 9, a simple provision

that, in respect to commerce and navigation ships and their cargoes trading between the two countries, the Dominican Republic should enjoy the *same favors* as the most favored nation received in the United States, there might, in one view, be ground for the claim of Dominica upon the political authorities of the United States for such exemptions as any other nation may receive. It may, however, for all the practical purposes of this case, be conceded that in that event there would be little scope for judicial cognizance. If, however, this claim shall be made not only under a general clause as described, but under that clause supplemented by the specific engagement to charge upon Dominican products no other or higher duties than are charged upon the like products imported into the United States from any other foreign country, a claim would be presented which all the departments of this Government have traditionally recognized as cognizable by the courts and readily capable of judicial determination. Whether such a claim, however, in that case would be determined in favor of the Dominican Republic, or otherwise, is not at issue and need not be considered in the case at bar.

IF, HOWEVER, THE GENERAL CLAUSE IN RESPECT TO FAVOR TO OTHER NATIONS IS ABSENT FROM THE TREATY, IT CANNOT BE PLACED THERE BY JUDICIAL INFERENCE. In its absence all opportunity for the exercise of political discretion is eliminated. All executive discretion in measuring official duty to enforce a treaty obligation is annihilated. While the treaty remains municipal law, not only the Executive Department but the courts are bound to apply it in a proper case in accordance with the ordinary principles of construction. An affirmative and unqualified obligation imperative on officers and courts cannot be diminished by unexpressed conditions and limitations. In its exposition as part of the municipal law full force and validity must be accorded to every word, so that no part be annulled or rendered nugatory. If the case before the court be not only within the obvious intent

and meaning of the provision under consideration, but be found, indeed, within the express words, it is no part of the judicial duty to insert in the language used any doubt or ambiguity to divert or to modify its meaning, or to deprive a party of a construction in accord with the manifest import of the words actually used.

XVI.

The case at bar is peculiarly distinguished from the case described in the opinion of Mr. Justice Field in *Bartram vs. Robertson* (122 *U. S., p.* —).

There the stipulation in question being accompanied with a general favored-nation agreement, the opinion said: "The stipulations were mutual for reciprocal advantages; no higher or other duties were to be imposed by either upon the goods specified; *but* if any *particular favor* should be granted by either to other countries in respect to commerce or navigation, the concession would become common to the other party upon like consideration—that is, it was to be enjoyed freely if the concession was freely made, or on allowing the same compensation if the concession were conditional. * * * If the exemption (in respect to Hawaiian products) is deemed a '*particular favor*' in respect of commerce and navigation within the first article of that treaty, it can only be claimed by Denmark upon like compensation to the United States. * * * The treaty provided that like compensation shall be given for such special favors."

It is unnecessary to inquire, for any legitimate purposes appertaining to the case at bar, whether the foregoing views are in all respects sound or in accord with the origin, purpose, history, and true construction of the treaty in that case considered. Such an inquiry would be beyond the scope of the case at bar, and, if of any pertinency whatever, it is surely not essential in the determination of the rights of the importer and the duty of the Government in the present case.

The absence in the Dominican treaty of any stipulation by which the parties engaged "mutually not to grant any particular favor to other nations in respect of commerce and navigation which shall not immediately become common to the other party who shall enjoy the same freely if the concession were freely made, or on allowing the same compensation if the concession were conditional," removes the expressions in that opinion from any application to the case at bar, and serves also to distinguish it with marked emphasis from the case arising under the treaty with Denmark containing the foregoing provision. Whatever force legitimately appertains respecting "particular favors" freely made or upon stipulated conditions or compensations, whether they be limited "in respect of commerce and navigation" or whether they may specifically extend to duties on imports or exports, is bereft of opportunity to apply itself as affecting any exposition of the treaty between the United States and the Dominican Republic. While it may be quite unnecessary to institute a judicial inquiry in any case as to how far contracting parties have or have not granted particular favors or have or have not exchanged compensations therefor, the marked absence in the Dominican treaty of any stipulation dependent for its fulfilment upon any compensation or consideration other than the positive and absolute engagements reciprocally imposed in the articles of the Dominican treaty remove from the case at bar all or any of the considerations in these respects alluded to in the foregoing opinion of Mr. Justice Field. It may not be improper, but, on the contrary, quite useful, in this connection, however, to mark the distinction between two classes of stipulations found generally in all United States treaties, covering on the one hand engagements measurable according to *favor* or according to the rights or privileges which "the most favored nation" has or shall enjoy, and those articles containing positive engagements touching the rights of citizens of the respective par-

ties in each other's territories, and the conduct of their business and the disposition of their property therein, with reference to times of peace and to times of war, the absolute rights of inheritance, of payment or exemption from tonnage and other dues, and from seizure under various circumstances in times of war and for extradition or exemption from extradition, according to the character of offence, whether it be political or otherwise, and for miscellaneous specified rights of person and of property cognizable at once by the judiciary of the respective countries, because the absolute character of the engagement specified in the treaty must be given the force of positive law so long as the treaty is in operation.

One difference between the two sets of provisions thus described is that an engagement "not to grant any particular favor to other nations in respect of commerce and navigation which shall not immediately become common to the other party, who shall enjoy the same freely if the concession was freely made, or on allowing the same compensation if the concession was conditional," conspicuously addresses itself to the political power of the governments, and, inherently, is incapable in some cases of being immediately enforced through the courts. In the United States a stipulation of this character can only be violated in a legal sense by the legislative or treaty-making power. Its honorable fulfilment is dependent upon the executive and legislative departments of the Government. There is little room under such an article as this for the operation of the judicial power, unless a case can be imagined in which the judicial arm should refuse to extend itself in any particular instance, lest by so doing a treaty obligation might be dishonored. It would be difficult to imagine such an instance. Instances, however, have been common where the operation of an act of Congress such as, for instance, the imposition of discriminating duties was made in terms dependent upon the extrinsic facts of the legislation of foreign governments,

which fact was sometimes to be ascertained by the executive departments of the United States and sometimes was left to be established in the courts. Such a case was brought into this Court in *Oldfield* vs. *Mariot*, where the Court received into consideration, after due proof, certain political acts or decrees of the government of Portugal as affecting the operation of the United States statute. No instance, however, is reported in all the cases under treaties which have received cognizance in the courts of the United States where the degree of favor, consideration, or compensation was made the subject of inquiry and condition of determination of rights guaranteed by treaty stipulations. The reason is obvious from the inherent nature of an engagement dependent upon favor and from the historical application and use of such treaty stipulations. Indeed, if the general treaty stipulation engaging not to grant particular favors except that they should immediately become common to the contracting party was yielded the force and effect accorded to it, and thus became capable of being immediately enforced in the courts, it would be quite unnecessary in a treaty having such a favored nation stipulation to encumber the treaty with a variety of stipulations respecting divers rights of persons and of property of the citizens of the respective parties in the countries of the other, and it would be quite unnecessay to provide for an equalization of tonnage duties or port charges or of an equality of duties on imports or exports or an equality of prohibitions in respect to exports and imports. All these and many other matters might in such a case be fully comprehended by the provisions of a treaty with a single nation, and repetition or re-engagements with other nations with or without a reciprocal engagement would be unnecessary. It would suffice to stipulate for favors like the most favored. It was, therefore, if this view be correct, a superfluous and unnecessary struggle of American statesmen for over fifty years when the first and second generations of American diplomats and jurists sought to engraft the American policy into the policy

of all nations, and to establish it not only as the guide for intercourse between the United States and other nations, but as indicating the principles upon which intercourse between all civilized nations should uniformly be conducted. Was it or was it not idle for the founders of this Government to seek to engraft the principles upon which it was founded into international law, to seek to secure equality and reciprocity in all matters relating to navigation, commerce, and intercourse with the world? Was it idle for the men of that day to project treaties which are alluded to by their draughtsmen as "the corner-stone of our subsequent transactions of intercourse with foreign nations" and as exhibiting to the world the "practical exposition of those principles?"

IT IS SUBMITTED THAT BY ALL OF THE AIDS WHICH MAY BE SUMMONED FOR THE LEGITIMATE PURPOSES OF CONSTRUCTION, IF ANY SUCH AIDS BE NECESSARY, AND BY ALL THE RULES ACCORDING TO WHICH OFFICERS AND COURTS MUST INTERPRET STATUTES, COMPACTS, CONSTITUTIONS, OR TREATIES, THE HISTORICAL, LEGITIMATE, LEGAL, UNAMBIGUOUS, ACTUAL, AND EXCLUSIVE MEANING OF ARTICLE 9 OF THE DOMINICAN TREATY IS THAT UPON ITS PRODUCTS "NO HIGHER OR OTHER DUTY" SHALL BE IMPOSED ON IMPORTATION INTO THE UNITED STATES THAN SUCH DUTIES, IF ANY, AS ARE BY LAW IMPOSED ON THE IMPORTATION OF SIMILAR PRODUCTS FROM THE HAWAIIAN KINGDOM OR ANY OTHER FOREIGN COUNTRY.

## XVII.

### *Unfounded Objections.*

1. It was on one occasion briefly hinted by counsel for the Government that the obligation in a treaty to impose no other or higher duty than was paid or shall be payable on the like products from any other foreign country signified only that the United States agreed that the duty should not, upon the products of the country with which such an engagement was made, be greater than the highest duty which

was charged on the like products from any country. This contention seems not to have been entertained by this Court, and, indeed, itself involves an absurd contravention of the obvious significance of the language; besides, it controverts the well-established purpose and value of the provision. Had it contemplated the possibility of such a meaning the phrase would not have closed with the words "than are or shall be payable on the like articles being the produce or manufacture *of any other foreign country.*" Instead of the words "of any other foreign country" for such a perverse construction the language must be tortured so as to run something like this: Than the *highest duty* which is or may be payable on the like articles being the produce or manufacture of any other country; in other words, establishing thus a different standard than that described by the words actually used. It need not be argued that such interpolation and perversion is not within the judicial province. The language runs: "No higher or other duty" than is payable on like articles, and the language will not warrant any reading implying that no greater duty *than the highest* shall be paid. If the words used have any significance and operation whatever they mean that no more duty shall be paid in one case than in the other, or, to state it another way, that *no greater* duty shall be paid in *one* case *than in the other. One* case is the importation from the treaty power; the *other* case is the importation of the like article from *anywhere else,* no matter from what place, the language being from "any other foreign country." As no other rendering of the words actually used is possible, so is the rendering here given the only rendering that is consistent with any value or purpose whatever in a reciprocal treaty provision of this character.

2. The object on the part of the United States was to secure for its products the right of sending them to the foreign country with which the treaty was made without subjecting such United States products to any greater imposts abroad

than like products from anywhere else that were sent into such foreign country. With many countries that right, if possessed by the United States, was a valuable one. Of course the United States readily conceded to such foreign country a similar reciprocal right. In doing so it was only engaging with the treaty country that it should enjoy what in truth, by our laws and according to our established policy, it would, in fact, have enjoyed without any such expressed stipulation on the part of the United States. Still, the stipulation was given, and its significance is to be, when construed and applied on the part of the United States, no other or different than the significance which is attached to the stipulation on the part of the foreign country for the benefit of the United States. In both instances the language and engagement, together with its construction and operation, are the same.

3. It has been suggested that as particular exemptions have been given for expressed "equivalents"—equivalents which are of so dubious a value as to have produced serious differences and contentions as to whether in truth equivalents they were—and that as valuable considerations are purported to have been exchanged, such exemptions are withdrawn from the standard list by which the duties that "are or shall be payable on the like articles from any other foreign country" are to be measured. It would seem that the statement of this proposition furnished its own answer. Where is the authority to interpolate words having any such significance? Upon what theory of construction or interpretation is it the province of the courts to limit the area of comparison by excluding one or more exemptions? Had the parties using the language under consideration intended any such result it would be easy to express it in adequate terms. They have not expressed it at all. To give such meaning necessitates adding a proviso, such as, Except that this clause shall not apply to special exemptions given by

law for purported equivalents. We venture the observation that such a result of clear and unambiguous language violates every principle of interpretation. It is not within the judicial province to insert any such exception in the provision under inquiry. It would be just as proper to add to the clause engaging that no prohibition on domestic importations should be made which shall not equally extend to every other foreign country—a proviso excepting that in the event of such prohibition peculiar privileges might be given to such foreign countries as may have bargained for them. Such a meaning would obviously destroy any purpose or value in the final clause of article 9, and no such limitation of its terms would be permitted. It is thus clear that exceptions cannot properly be intruded that will impose limitations upon the legitimate scope and operation of the language of this treaty provision.

4. It has been hinted that the Hawaiian treaty marks a new chapter in our national policy and has dispensed with the custom and force of argument attendant upon the principles of equality and reciprocity which, from the infancy of this Government, has distinguished its foreign relations. The thought has also been entertained in some quarters that the contentions of these plaintiffs are directed to the destruction of the Hawaiian treaty and the consequent derangement of trade and discouragement of possible future compacts of that alleged reciprocal character. While such considerations have no proper form in the issues that exclusively belong to this Court, they are of that public character that may justify on this page an allusion to their misconceptions and errors.

*a.* In the first place it should never be forgotten that the plaintiff's exemption under the Dominican treaty is founded, not upon the Hawaiian treaty, but upon *the absolute and unqualified law of an act of Congress* declaring that the molasses to which the plaintiff's articles correspond shall be free of duty.

The right, under the Dominican treaty, is perfected by that act of Congress continuing operative and unimpaired by the express declaration of section 11 of the act of 1883. Nothing respecting equivalents or exceptional concessions or the policy of special treaties is therefore germain to the case at bar.

Had Congress attached to the act of 1876 a proviso that its enactment should not be held to give effect to the provisions of any treaty between the United States and any foreign power, there might be some justification for the courts to make a judicial appendix of such a character. Had it been exceptionally designed by Congress that the free admission of these Hawaiian products should not bring about the free admission of corresponding products from Dominican Republic, it would have been enacted by proviso or otherwise that the exemption of the former should not apply to the latter, or that Dominican products or the products of all other countries than the Hawaiin Islands should continue to pay duties according to the then existing tariff, or by some other unequivocal act or declaration Congress would have made known such intention. It is not to be inferred or implied. It is, however, fair to assume that any attempt to insert such proviso would have been regarded by Congress as a design to violate a treaty obligation which it is as much the constitutional duty of Congress as of the other departments of the Government faithfully to observe. The courts may not create such a proviso.

*b.* Shall it be said that the considerations producing the passage of an act of Congress are proper subjects of judicial inquiry in this civil suit?

In truth, however, there have been long and serious controversies as to whether any valuable considerations or equivalents whatever inure to the United States under the treaty with Hawaii, and the special legislation required by it was not accomplished without dissent. It has since been repeatedly assailed in both Houses of Congress, on the ground that it provokes fraud and is burdensome rather than advanta-

geous to the United States. Views of this character have proceeded, without regard to party, from distinguished statesmen otherwise differing widely in their political views. Among those whose public documents have recorded their official expressions adverse to the policy of the Sandwich Island treaty and the act of Congress upon it are Mr. Morrison, in an adverse report on the bill to carry the treaty into effect (1875, H. Report 116, part 2, 44th Cong., 2nd Sess.); Mr. Kasson (1883, H. Report No. 1860, 47th Cong., 2nd Sess.), who said: "There can be no question, therefore, that in this respect the treaty has ceased to be fair and reciprocal;" Mr. Belmont (1883, H. Report 1860, part 2, 47th Cong., 2nd Sess.); Senators Sherman, Brown (Sen. Report 76, part 2, 48th Cong., 1st Sess.); Morrill, Voorhees, Aldrich (Sen. Report No. 1013, 47th Cong., 2nd Sess.). For an extract of some expressions from these Senators see appendix "A" to this brief. In a report from the Senate Committee on Finance in 1883 it was said: "The present reciprocity treaty with the Hawaiian Islands is so obviously adverse to the interests of the United States, and so much more than would now be asked for by Hawaii, that nothing less than its abrogation affords a sufficient remedy." The committee of the St. Louis Merchants' Exchange declared in 1882 that the treaty resulted in an annual loss to this country on sugars of "considerably over $3,000,000, which is more than the entire value of all goods exported from the United States" to Hawaii for the three previous years, without at the same time lessening the cost of sugar to the consumer in any place.

In discussing the immediate principle applicable to the case at bar, Senator Morrill, in resisting special exemptions, is quoted as saying:

"If any production of one nation is subjected to a less duty than that imposed on a similar production of some other nation, no matter whether the difference has been brought about by legislation or by treaty or by both com-

bined, it would seem to be a substantial violation of all compacts, which set forth that no other or greater duties shall be imposed than those which are paid upon the productions of the most favored nations. Every fresh example in the line of a possible future settled policy of select and special *favoritism* will be found *dangerous* and *in conflict with* our plighted faith." * * *

*c.* It is true that most of the foregoing observations relate rather to the politico-economic side of the question than to its judicial aspects. Yet, if any consideration whatever touching equivalents or compensations form an element in determining the rights of any nation having a treaty with the United States, it will not be denied that *such nation* would not deem itself excluded from inquiring respecting equivalents and compensations beyond the letter of the writings in the laws or treaties which this Government has itself perfected with third nations.

It will not be denied that in international comity the meritorious claim of one nation upon another, founded upon the solemn compact of a treaty, is incapable of avoidance under the color of formal recitals in agreements with other powers. If such recitals were but pretexts for agreements and should prove to have been inserted with a view of avoiding absolute engagements previously contracted with other nations, such contracts, in all fairness, could not, in amity and justice, thereby be avoided. Technical rules in such an event would form no bar to a meritorious inquiry into the actual facts should a claim of that character between nations become the subject of international arbitration by a third nation.

*d.* It can scarcely be argued, therefore, that in the Supreme Court of the United States, which holds comity between nations, or, in other words, international law, to be a part of the common law, which it is the duty of this court to administer, considerations which, as between nations, become legitimate and proper subjects of inquiry should be absolutely excluded from the possible range of judicial vision.

Indeed, they cannot be absolutely obscured, and hence are proper subjects to be alluded to when this court is called upon to apply the common-law principles of international law in a proper case that may require that application.

It is, therefore, sound argument in the case at bar to submit that *whatever rules of construction of treaties legitimately apply to an arbitrator between two treaty powers may—nay, should—be weighed by this court in any case involving a claim of treaty right.*

So it is respectfully submitted that if this court, in any view of the case, may with propriety inquire behind the act of Congress of August 15th, 1876, with a view to base its determination upon any considerations involving the advantages, compensations, or equivalents supposed to have been motives for that enactment, the duty is unavoidable to inquire by appropriate judicial procedure into *all* the elements comprising the supposed equivalents. If the act of Congress be not the end of the matter and does not render it improper to proceed *aliunde*, then it is submitted that the mere recital in a treaty that the parties treat for valuable considerations mutually paid or exchanged is not the end of the inquiry. Other governmental acts at least may be looked at.

*e.* These observations indicate the difficulties, dangers, and discontents that are likely to ensue from any departure from a treaty engagement and from the meritorious principles by which the terms in which that engagement is expressed are to be construed and interpreted.

*f.* Nor is the contention of plaintiffs in error in the case at bar calculated to impair the traditional policy of equality and reciprocity in our foreign relations. The so-called reciprocity treaties that have been made, if properly construed and applied, do not necessarily intrude on that policy, although the contrary may upon their face appear. A more

careful scrutiny of the limited number of exchangeable commodities enumerated in the few treaties of this character that have been consummated on the part of the United States will immediately demonstrate that no serious consequence to our revenue or to our commerce would accrue from the operation contended for in the case at bar. Moreover, the Dominican treaty is exceptional in its features and omissions.

By applying to the staple products of the Dominican Republic, which are like the products from the Hawaiian Islands, the same and no other duty than paid by the latter when imported into the United States, a result of equality and reciprocity is at once attained without prejudice to our revenue, and with reciprocal advantages to our commerce. Thus, molasses and sugar of specified grades from the Sandwich Islands come in free, and the comparatively small exportations of Santo Domingo that are of the same character will be admitted free of duty. The great staples of commerce upon which our tariff scheme is founded would not be affected by this construction and would not have been affected by the construction here contended for had it been a practical question under the Canadian or any other reciprocity treaty. Such a clause as article 9 of the Dominican treaty is not found in our foreign treaties that would affect importations from Cuba, from the British West Indies, or from French possessions. The character of articles which the United States has stipulated to admit free would be very slightly affected by reason of provisions in our treaties. No other treaty with any of the great powers is found to correspond with the special terms and omissions of the treaty with the Dominican Republic. A clause like article 9, together with other clauses relating to favor, etc., etc., as above mentioned, may be found in many treaties, chiefly, however, with South American countries. It need not be suggested that if the present contention applies to the South American treaties (which need not now be considered),

important advantages to United States commerce would follow.

If, on the other hand, in consequence of obedience to treaty rights and the operations of the municipal law resulting from our international obligations results disadvantageous to our commerce or national interests shall occur, the immediate remedy is at hand by the termination of any treaty that, in the judgment of the political authorities, is practically working to our national prejudice. The right to denounce is carefully reserved and may even now be exercised in respect to the Dominican and nearly all the important United States treaties.

*g.* These allusions may be multiplied so far as to trace in respect to each commodity enumerated in the Sandwich Island treaty the relations of that commodity to our commerce and to our revenue. Such an inquiry would develop the equality and reciprocity that would result from the harmonious exposition of the act of Congress of 1876 in its relation to our foreign treaties. It *is the duty of this Court to harmonize this act of Congress with the obligations of this Government, expressed in its various treaties.* By this harmony and unity that which the supreme law of the land has in statute and in treaty declared "shall be" the duty or the exemption in respect to an importation will be applied as the judgment of this Court.

The meaning contended for here may be aptly expressed in the language of one of the United States treaties recently negotiated, where it was stipulated that as to the amount, etc., of duties "each of the two high contracting parties bind itself to give to the other the advantage of every favor, privilege, or diminution in the tariff on the import or export on the articles mentioned or not in the present convention that it shall have granted to a third power." If this be the meaning of article 9, used as the effect of positive law on all departments of the Government, absolutely, unqualifiedly,

and as a self-executing provision, it follows that the judgment below was error.

*h.* Nor is it of any consequence whether the plaintiff in error be a private person or the foreign government.

It would be difficult to imagine a case in which rights of the character contended for in the case at bar could be made the subject of a litigation in which a foreign government should be the plaintiff. Whether any foreign nation has complained or not to the political department of the Government is scarcely a pertinent inquiry. It does not appear but that such complaint has been made; the record is silent.

It is not necessary to aver that any such complaint has been made and denied as a condition that must precede action by the courts. Such complaint would necessarily be treated by the political department, and would not become cognizable in the courts, which must act exclusively on the "case" brought before them in accordance with the statute.

*To reduce the remedies for treaty violation to exclusive action by the executive upon complaint of the nation affected would be to abrogate judicial functions and duties.*

## XVIII.

### *Treaty Rights Reserved by Present Tariff.*

The provision in section 11 of the tariff act of 1883, which reserves all treaty rights or any laws passed for the execution of any treaty from the operation of the tariff schedules preceding section 11, is not only in harmony with the established policy of this country, but was rendered necessary from the circumstance that no legislation after the act of Congress of August, 1876, occurred upon its subject-matter until the tariff of 1883. Had the tariff of 1883 provided a duty upon all molasses, sugars, rice, and other commodities mentioned in the act of 1876, and imposed that duty uni-

formly and unqualifiedly upon such products, from whatever place imported, a conflict of laws or treaties might have occurred. The rights of the Dominican Republic under article 9 of the treaty of 1867 did not take effect until September 9th, 1876, the date of the President's proclamation, specified in the act of August 15th, 1876, as the date from which the latter act commenced to operate. From that time forward the exemptions established by article 9 of the Dominican treaty continued. They might have been interrupted by the tariff of 1883 had it not been for the proper reservations and exceptions provided for by section 11 of that tariff act.

A similar reservation of treaty rights has long been a feature in our laws. One such illustration may be found in section 4227, Revised Statutes, providing that nothing in that title which imposes tonnage dues shall impair treaty rights.

## XIX.

### *Conclusions.*

From the foregoing considerations it may be recapitulated:

1. That a national compact must be observed by the national authority in all its departments according to its true intent and meaning, and through every channel of governmental authority the compact should in national good faith receive the operation for which it was calculated. This principle applies to every government, no matter what its nature or form, that makes itself a party to a treaty.

2. The true intent and meaning of an international compact is to be discovered by all the legitimate means attending upon the exposition of solemn instruments between high contracting powers. All governmental authorities should ascertain that meaning according to the language used, the

obvious intention of the parties as expressed in the words of the instrument, aided, if necessary, by the circumstances attending the compact, its historic origin, purpose, and declared method of operation.

3. In a republican government peculiarly formed as our own the uniform construction and operation of international compacts has been secured by their incorporation into the municipal law of the country. In so far, therefore, as that law thus expressed is capable of being directly applied, it is the duty of all departments of the Government to apply it.

4. In the fundamental subdivisions of governmental authority established by the United States Constitution the uniformity of the municipal law resulting from the United States treaties is further secured by the exclusive jurisdiction as a last resort of the power of the Supreme Court to construe and to interpret such municipal law in its operations upon all departments of the United States Government as well as in its application to the rights of property and of person.

5. In so far as treaties impose obligations capable of enforcement by the United States, exclusively through the established political authorities of its Government, not requiring the intervention of judicial authority and inherently incapable in their nature of being directly enforced through the courts, the judiciary department of the United States will accept the determination of the political authorities as measuring the extent of the obligation and its fulfilment, and will not intrude its own views into that political conclusion.

6. In so far, however, as the declarations of treaties incorporated into the municipal law are removed from any political discretion and are absolute and unqualified in terms, the judiciary will enforce the sense and operation of

of those declarations in any proper case and upon any officer or servant of any department of the Government.

7. By the origin, history, purpose, and operation from its earliest form of the treaty provision in controversy in the case at bar there is no opportunity for doubt, ambiguity, or diversion from the inevitable meaning expressed in the particular language that has been employed.

8. The meaning of article 9, by any and every rule of construction, is unimpaired by any other provision in the treaty between the United States and the Dominican Republic, and is without intrusion upon its intent or its phraseology from any source whatever. That meaning is that no other or higher duty shall be imposed by any authority of the United States upon certain specified products imported from the Dominican Republic; and those specified products are the *like products* that are *imported* from *any other country* whatever; or, as expressed by one of the earlier foreign draughtsmen, or "from anywhere else."

9. The Dominican product imported by the plaintiff is not merely the "*like*" product, but is *the* product (molasses) enumerated in the act of Congress approved August 15, 1876, by which act such product is to be admitted free of duty if the product of the Sandwich Islands. This law of Congress is to be given full "force and effect," together with all treaty rights to which it gives rise, pursuant to the express mandate of section eleven of the tariff act of March 3, 1883.

10. By the laws of Congress, therefore, the precise event contemplated in the engagement stipulated by article IX of the Dominican treaty has occurred, and the law of the treaty that in that specified event *no other duty* SHALL BE paid than is chargeable upon the Hawaiian product is *the law* in this case for the defendant or the Government and for the plaintiff.

11. This law should be applied by this Court. Applied to the facts exhibited by the record it was error for the court below to sustain the demurrer, and the judgment should be reversed.

Dated New York, December, 1887.

HENRY EDWIN TREMAIN,
MASON W. TYLER, *Of Counsel.*

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## Appendix A.

*Extract from Senate Report No.* 1013, *47th Congress, 2d Session, February* 27, 1883, *Finance Committee, Referred to in Foregoing Argument.*

"When our Constitution was framed no compact between two different nations such as a reciprocity treaty was known or ever existed, and the power of the President, 'with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senate concur,' must be accepted as a limitation of the power to just what was then known and understood to be comprehended by the words 'to make treaties.' The Constitution cannot be changed by any modern diplomatic inventions. It is true that Cromwell, in 1654, made a treaty with Portugal by which English woollens were to be admitted into Portugal at a lower rate of duty than from other countries, and the wines of Portugal were to be charged, when brought to England, with a less rate of duty than wines imported from France or elsewhere; but this, although a commercial treaty, was not a reciprocity treaty, and Adam Smith conclusively proved that even this much-vaunted treaty was disadvantageous to England.

"Our Constitution does not lack harmony, and all of its provisions show that it was never intended that the President and the Senate should have even the initiative in regulating trade or commerce. That power is given up wholly to 'Congress to regulate foreign and domestic commerce and with the Indian tribes,' and the President cannot call to his aid any foreign power, even with the advice and consent of the Senate, to regulate commerce, whether foreign or domestic.

"A still greater inhibition of this modern shape of the treaty power is found in another provision of the Constitution, which provides that—

"All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills.

"No reciprocity treaty could be made that would not be a direct infraction of this provision of the Constitution, as

all such treaties must necessarily curtail the boundaries within which revenues are or can be raised. If such a treaty could be made with one nation it would be possible to make like treaties with all, and thus the power of the House of Representatives to originate revenue bills would be suspended and frittered away. It does not help the main question in the least to obtain the consent of an existing House of Representatives to pass a law in conformity with or to carry out the provisions of such treaty. The power of the House to originate revenue bills inheres forever, and no existing House can exercise that power so as to deprive a succeeding House of any of its proper constitutional functions.

"Again, the 'most favored nation' clause, in the larger part of our treaties with other nations, is a perpetual suggestion of the most serious complications always lying in wait for all reciprocity treaties. Should any of these nations tender the same or equal terms we must, of course, accord the same and equal favors, and any reciprocity treaty might be suddenly and wonderfully expanded, or we might have the alternative of a conflict with many nations with whom peaceful relations are most desirable.

"In the determination of this question our experience ought to have some weight, and that experience shows in every instance where a reciprocity treaty has been tried that immense American interests have been sacrificed. No one has resulted to our advantage. Justin S. Morrill, Daniel W. Voorhees, Nelson W. Aldrich."

## Appendix B.

In the fourth article of the treaty with Tonga, sent to the Senate February, 1887, is a neat expression covering the purport and significance of the reciprocal engagement which is the subject of this cause. The provision was that no customs duty shall be charged on the products or manufactures "of one country when imported therefrom into the other country other or higher than is charged upon the same the produce or manufacture of or imported from *any other country.*"

## Appendix C.

The instances in which the Supreme Court has expounded treaty provisions and applied them directly to individual rights of property and of person are too numerous to justify further review in this brief. State courts also in many cases have proceeded in the same way. Should additional references of this character be desired it may be convenient to note at this point the following:

*Orser* vs. *Hoag*, 3 *Hill*, 79, is one of a class of cases which shows a judicial administration of treaties providing (as many United States treaties have provided) for existing titles. In the same line are *Hutchinson* vs. *Brock*, 11 *Mass.*, 122; *Jackson* vs. *Porter*, 1 *Paine C. C. R.*, 481; 1 *Hun*, 689; 59 *N. Y.*, 110; *Anderson* vs. *Lewis*, 1 *Freeman's Ch.*, 183, where a State court, in expounding and applying an Indian treaty, says: "Where individual rights vest under a treaty, its meaning in reference to that is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts. It must receive such construction as will best effectuate the intention" (see Vattel, chapter 17). State statutes in conflict with treaties fall to the ground under judicial declarations to that effect (1 Madison's Works, page 524; 7 Hamilton's Works, page 512; Rawle on Constitution, page 59). So it has been repeatedly adjudged in cases of serious conflict (8 *Opinions Attorney General*, 417); and so it would be held again should a case arise; for instance, where the treaty rights and privileges stipulated to appertain in the United States to citizens of the Dominican Republic, their persons or their property, should be infringed upon by State legislation.

Notable instances where this Court has expounded treaties or determined rights claimed exclusively under treaty provisions, are: *U. S.* vs. *Schr. Peggy*, 1 *Cranch*, 103. By section

5 of the act of Congress, of July 5, 1798, French armed vessels, with their material and goods on board, captured by American privateers should be forfeited, and, on condemnation, distributed among the captors. The French schooner "Peggy," being thus captured, was condemned by decree in Connecticut circuit court September 23, 1780. Pending an appeal from this decree a treaty was ratified, the fourth article of which stipulated that "property captured and not yet definitely condemned, or which may be captured before the exchange of ratification, shall be mutually restored." There was no legislative act to give effect to this treaty provision, or to impair the operation of the act of Congress and the lawful decree of the court, which had been rendered pursuant thereto; but this Court held that the treaty provisions supervened, and directed the release of the vessel. Chief Justice Marshall said: "Where a treaty is the law of the land and as such affects the rights of parties litigating in this Court, that treaty, as such, binds those rights and is as much to be regarded by the court as an act of Congress; and, although restoration may be an executive act, when viewed as a substantive act, independent of and unconnected with other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and, in consequence, improper." So, here, for the executive to impose "higher or other duties" on Dominican products than are imposed by law on like products from "any other foreign country" is an infraction of law cognizable in the courts, and for which the judiciary affords the exclusive remedy. The Court held that not only was the judiciary at liberty to regard the treaty as operative without reinforcement by act of Congress, but it was bound so to regard it. The requirement of the stipulation was operative and obligatory by force of the treaty alone.

In *Ware* vs. *Hylton*, 3 *Dallas*, 239, the relation between a Virginia statute and the stipulation of article 4 in the treaty

of 1783 was considered at great length, and the treaty itself deliberately expounded and applied. The principles, also, according to which inquiries of this nature should be judicially pursued, were learnedly denoted. Chase, J., said: "I will adopt the following remarks, which I think applicable (2 Ruth., 307–315; Vattel, 2, chapter 17, sections 263–271): The intention of the framers of the treaty must be collected from a view of the whole instrument and from the words made use of by them to express their intention or from probable or rational conjectures. If the words exhibit the meaning of the parties plainly, distinctly, and perfectly there ought to be no other means of interpretation, but if the words are obscure or ambiguous or inappropriate, recourse must be had to other means of interpretation, and in these three cases we must collect the meaning from the words or from probable or rational conjectures, or both," &c., &c. (page 240). Then he remarks as to the article 4 that it is stipulated "certain things shall *not* take place." * * * Iredell, J.: "I consider a treaty as a solemn promise by the whole nation that such and such things shall be done or that such and such rights shall be enjoyed" (page 272). In *Society, &c.*, vs. *New Haven*, 8 *Wheat.*, 464, this Court applied the terms of article 6 of treaty of 1783, as confirmed by treaty of 1794, to the property rights of a benevolent society without legislative intervention.

In *Orr* vs. *Hodgson*, 4 *Wheaton*, 462, the two treaties of 1783 and 1794 with Great Britain were directly applied by the judiciary, according to their terms, without intermediate provisions by Congress detailing how and in what manner those terms should be made effective; and provisions prohibiting certain confiscations and prosecutions and giving validity to titles according to specified tenures were at once interpreted and applied to the facts of the case in hand. In *Fairfax* vs. *Hunter's Lessee*, 7 *Cranch*, 627, a similar course was approved. In *Bright's Lessor* vs. *Rochester*, 7 *Wheat.*, 544, treaty provisions were applied in the first instance by a State

court without legislative intervention. In *Chirac* vs. *Chirac*, 2 *Wheat.*, 271, Chief Justice Marshall directly applied a treaty right, which, having vested, was judicially maintained, notwithstanding the treaty had expired (*ibid.*, 277). The propriety of judicial interpretation of a treaty (1853) with France was not questioned when the legality of a State succession tax claimed to intrude on treaty rights was before the Supreme Court in 1856 (*Prevost* vs. *Greneaux*, 19 *How.*, 7). In *Comegys* vs. *Vasse*, 1 *Peters*, 193, Story, J., proceeded to expound treaty with Spain. (See also *Doe* vs. *Braden*, 16 *How.*, 657.)

In *The Amiable Isabella*, 6 *Wheat.*, 71, the Supreme Court says: "This Court does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government; and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions. It would be to make, not to construe, a treaty. Neither can this Court supply a *casus omissus* in a treaty any more than in a law. *We are to find out the intentions of the parties by just rules of interpretation applied to the subject-matter, and, having found that, our duty is to follow it as far as it goes,* and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind." * * * "We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation upon any notion of equity or general convenience or substantial justice. The terms which the parties have chosen to fix * * * and the circumstances under which they are to have operation rest in the exclusive discretion of the contracting parties, and, whether they belong to the essence or the modal parts of the treaty, equally give the rule to judicial tribunals."

Further illustration might be afforded by the numerous standard instances too familiar in this Court to require special citation, where the judiciary determined directly disputed property rights depending upon the treaty of Guadalupe Hidalgo and upon other treaties by which territory had been ceded; as well as in many other cases where treaty stipulations were immediately applied to a case otherwise unaided or impaired by legislation.

# SUPREME COURT OF THE UNITED STATES.

*October Term*, 1887—*No.* 1012.

HUGH KELLY, PLAINTIFF IN ERROR,

*vs.*

EDWARD L. HEDDEN, COLLECTOR, ETC., DEFENDANT IN ERROR.

*October Term*, 1887—*No.* 108.

JAMES F. WHITNEY, HENRY BUSCHMANN, AND CHARLES S. WHITNEY, PLAINTIFFS IN ERROR,

*vs.*

WILLIAM H. ROBERTSON, COLLECTOR, ETC., DEFENDANT IN ERROR.

## BRIEF AND ARGUMENT OF A. J. WILLARD.

The leading question in this case involves the construction of the ninth article of the treaty of the United States with the Dominican Republic, proclaimed October 24, 1867, which is as follows:

"No higher or other duty shall be imposed on the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic or of her fisheries, and no higher or other duty shall be imposed on

the importation into the Dominican Republic of any article the growth, produce, or manufacture of the United States or their fisheries, than are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country or its fisheries.

"No other or higher duties or charges shall be imposed in the United States on the exportation of any article to the Dominican Republic, nor in the Dominican Republic on the exportation of any article to the United States, than such as are or shall be payable on the exportation of the like article to any other foreign country."

The only other article in this treaty that touches the subject of that just cited, in any degree, is the sixth article, and that article deals altogether with rights of navigation as between the vessels of the respective contracting powers, and makes only incidental reference to their cargoes, and cannot, therefore, throw any direct light upon the proper construction of the ninth article.

This treaty is characterized by the entire absence from it of the expression "favored nation," and contains no general clauses to which article 9 can be referred for the purpose of construction. It follows that article 9 must be construed from its own inherent force and with little aid from the context.

The language under examination represents a distinctive policy in reference to foreign intercourse that is traceable to the deliberations of the Continental Congress and to a date earlier than that of the Articles of Confederation. The history of the initiation and development of this policy is essential to the proper interpretation of the language under consideration, while of profound interest in itself as happily characterizing the attitude of American diplomacy towards the most advanced ideas of international intercourse.

The principle of this article first appears in a plan of treaty with France adopted by the Continental Congress in 1776.

The plan appears first as reported to Congress by the Committee of the Whole. (American Archives, 5th series, Vol. 2, page 1352.)

It was acted upon and recommitted August 27, 1776, as appears by the following note, at page 1349 of same volume: "Plan of treaties gone through in the Committee of the Whole, August 27, 1776, and recommitted that instructions may be drawn conformable thereto."

The committee reported the same, with amendments, and it was adopted September 17, 1776.

The plan, as first reported, did not name any powers with which it was to be negotiated, but described such powers as A and B. Upon their committal it was again reported, with modifications, and the King of France was named as a contracting party.

With the final form of the treaty was reported instructions to the minister who should conduct the negotiation, who was not at that time chosen. Subsequently Benjamin Franklin was chosen by Congress to conduct the negotiation, and a letter of authority was adopted by Congress September 28, 1776. (Secret Journals of Congress, Foreign Affairs, 1775, 1776, Vol. 2, page 32.)

Article 1 of the plan was as follows:

ARTICLE 1. The subjects of the most Christian king shall pay no other duties or imports in the ports, havens, roads, countries, islands, cities, or towns of the said United States or any of them than the natives thereof or any commercial companies established by them or any of them shall pay, but shall enjoy all other the rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce, in passing from one port thereof to another and in going to and from the same from and to any part of the world which the said nation or country enjoys."

Article 2 applies the same provisions to the subjects of the United States in France.

Article 11, the only other article that touches the present question of construction, is as follows:

"It is the true intent and meaning of this treaty that no higher or other duties shall be imposed on the exportation of anything the growth, production, or manufacture of the islands of the West Indies now belonging or which may hereafter belong to the most Christian king to the said United States or any of them than the lowest that are or shall be imposed on the exportation thereof to France or to any other part of the world."

The instructions adopted by Congress under which the treaty was to be negotiated contain the following language, which is the only allusion to the first and second articles of the plan, namely:

"If his most Christian majesty shall not consent that the inhabitants of the United States shall have the privileges proposed in the second article, then the United States ought not to give the subjects of his most Christian majesty the privileges proposed in the first article, but that the United States shall give to his most Christian majesty the same privileges, liberties, and immunities, at least, and the like favor in all things which any foreign nation the most favored shall have, provided his most Christian majesty shall give to the United States the same benefits, privileges, and immunities which the most favored nation now has, uses, or enjoys."

"And in case neither of these propositions of equal advantages are agreed to, then the whole of the said articles are to be rejected rather than obstruct the progress of the treaty."

Subsequently to the action already stated a letter of credence was adopted by Congress, commencing as follows:

"Whereas a trade upon equal terms between the subjects of his most Christian Majesty the King of France and the people of these States will be beneficial to both nations," &c.

Under this letter Benjamin Franklin was accredited as minister to France.

It thus appears that Franklin was authorized to treat on the basis of alternative propositions, the one embodied in the plan to be preferred, and both regarded by Congress as producing equality in trade relations between the two countries.

It appears that France did not accept the terms of articles 1 and 2, but conceded the principle of the alternative clause.

The treaty of 1778 with France, which was the result of the negotiations thus directed by Congress, contains the following articles:

"ART. 2. The most Christian king and United States engage mutually not to grant any particular favor to other nations, in respect to commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely if the concession were freely made or on allowing the same compensation if the concession were conditional.

"ART. 3. The subjects of the most Christian king shall pay in the ports, roads, countries, islands, cities, or towns of the United States or any of them no other or greater duties or imposts, of what nature soever they may be or by what names soever called, than those which the nations most favored are or shall be obliged to pay, and they shall enjoy all the rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce, whether in passing from one port in said States to another or in going to and from the same from and to any part of the world, which the said nations do or shall enjoy."

It will be perceived that, while the general phraseology of the first two articles of the *plan* was retained, the element of favor was injected into them, thus adopting in principle the alternative proposition advanced by Congress, which must be regarded as the least favored by that body.

The treaty with the Netherlands in 1782 followed the language of the treaty with France already stated, with only slight verbal differences of no importance.

The treaty of 1785 with Prussia retains in principle the provisions of the French treaty of 1778, although simplifying its expressions, and rests upon the idea of favor. The treaties with Sweden and Morocco, respectively, in 1783 and 1787, contained the favored-nation clause substantially as the same was employed in the third article of the treaty with France.

It appears that up the time last mentioned no nation had conceded that which was intended by the first two articles of the plan, whatever that may have been, but had insisted upon the principle of the alternative proposition.

The first embodiment in a treaty of the principle of the first two articles of the plan was in the treaty with Great Britain in 1794. Mr. Jay was entrusted with the negotiation of this treaty, and his instruction contained a direction to avoid the use of the expression *favored nation* as leading to embarrassment. (Am. State Papers, For. Rel., vol. 1, p. 473.) The effect of this instruction was to require that the principle of the first two articles of the plan should be the basis of the negotiation, and to disclose the fact that a leading objection to the use of the favored-nation expression was the embarrassments to which it gave rise. It is evident that the embarrassments referred to were such as were found or anticipated to arise in the practical application of the treaty provision. It is easy to perceive that the "embarrassments" were anticipated as arising from the nature of the question of favor, which could only be solved by the political power, which could be avoided if the relations of the governments were placed upon the basis of a contract capable of judicial interpretation. It will be observed that the sketch submitted by Lord Granville contained the favored-nation clause, but that that clause was eliminated from the treaty as finally agreed to and ratified.

Article 15 of the treaty of 1794 with Great Britain is as follows:

"ART. XV. It is agreed that no other or higher duties shall be paid by the ships and merchandise of the one party in the ports of the other than such as are paid by the like vessels or merchandise of all other nations, nor shall any other or higher duty be imposed in one country on the importation of any articles the growth, produce, or manufacture of the other than are or shall be payable on the importation of the like articles being of the growth, produce, or manufacture of any other foreign country," &c.

The remainder of the article relates to prohibitions of exports and imports.

Subsequent to the treaty last mentioned and prior to the treaty with Great Britain in 1815 treaties were made with several powers, as with Algiers in 1795, Tripoli in 1796, Tunis in 1799, and France in 1800, in the two last named of which the rights conferred were dependent on the question of favor, while in the two first named the rights secured were such as were granted to other nations at large, irrespective of the ground of such grants, whether favor or compensation. It appears that the diplomacy of the United States pursued the line of direction given to it by the plan, though opposed by the traditional ideas of the foreign powers.

The form of compact founded upon article 1 of the plan, but expanded to a broader international character, which has entered at this day into about forty of the treaties negotiated by this Government with foreign powers, and which is found in the Dominican treaty of 1867, was first definitely formulated in the treaty with Great Britain in 1794, although limited in its scope by the treaty of 1815 to the products of the possessions of that nation in Europe.

Article 2 of the treaty of 1815 with Great Britain is as follows:

"No higher or other duties shall be imposed on the importation into the United States of any articles the growth, produce, or manufacture of His Britannic Majesty's territories in Europe, and no higher or other duties shall be imposed on the importation into the territories of His Bri-

tannic Majesty in Europe of any articles the growth, produce, or manufacture of the United States, than are or shall be payable on the like articles being the growth, produce, or manufacture of any other foreign country; nor shall any higher or other duties or charges be imposed in either of the two countries on the exportation of any articles to the United States or to His Britannic Majesty's territories in Europe, respectively, than such as are payable on the exportation of the like articles to any other foreign country; nor shall any prohibition be imposed on the exportation or importation of any articles the growth, produce, or manufacture of the United States or of His Britannic Majesty's territories in Europe to or from the said territories of His Britannic Majesty in Europe or to or from the said United States which shall not equally extend to all other nations.

"No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States; nor in the ports of any of His Britannic Majesty's territories in Europe on the vessels of the United States than shall be payable in the same ports on British vessels.

"The same duties shall be payable on the importation into the United States of any articles the growth, produce, or manufacture of His Britannic Majesty's territories in Europe, whether such importation shall be in vessels of the United States or in British vessels, and the same duties shall be paid on the importation into the ports of any of His Britannic Majesty's territories in Europe of any article the growth, produce, or manufacture of the United States, whether such importation shall be in British vessels or in vessels of the United States.

"The same duties shall be paid and the same bounties allowed on the exportation of any articles the growth, produce, or manufacture of His Britannic Majesty's territories in Europe to the United States, whether such exportation shall be in vessels of the United States or in British vessels; and the same duties shall be paid and the same bounties allowed on the exportation of any articles the growth, produce, or manufacture of the United States to His Britannic Majesty's territories in Europe, whether such exportation shall be in British vessels or in vessels of the United States."

It will be observed that that portion of the article just referred to that relates to duties on imports into the respective countries is identical, except as it regards the names of the contracting parties, with the ninth article of the Dominican treaty of 1867, except that its operation, as it respects Great Britain, is limited to the territories of that power in Europe. It is a well-understood fact that the United States were at that time largely influenced in their foreign negotiations by the importance of securing unlimited commercial intercourse with the British possessions in America, and especially with the West India Islands, and the plan submitted naturally contained provisions which, if accepted by Great Britain, would have secured that end. In the treaty of 1794 with Great Britain the limitations of the scope of these clauses to the territories of that nation in Europe was not stipulated, but was insisted upon in the treaty of 1815, as appears by the text of the last-named treaty.

The plain inference from the fact just stated is that the British diplomatists regarded the effect of the general clause, independent of such limitation, to be to admit American commerce into the British colonial possessions upon the same terms upon which it was admitted into the home ports, and thus to prevent Great Britain, notwithstanding her intimate relations with her colonies, from deriving any advantage in her commercial intercourse with them that would not enure to the equal benefit of the United States under the terms of the treaty. In other words, they regarded the general clause under consideration as excluding any special arrangement between Great Britain and her colonies whereby advantages in trade should be secured to Great Britain not at once enjoyable by the United States, and therefore they demanded and were accorded the limitation to the territories of that power in Europe.

In the treaty of 1816 with Norway and Sweden the article in question appears in the following form:

"No other or higher duties, imposts, or charges whatsoever shall be imposed on the importation into the territories of His Majesty the King of Sweden and Norway of the produce or manufacture of the United States nor on the importation into the United States of the produce or manufactures of the territories of His Majesty the King of Sweden and Norway than those to which the same articles would be subjected in each of the two countries, respectively, if these articles were the growth, produce, or manufacture of any other country."

The final form of the article in question was reached in the treaty of 1825 with the Federation of Central America, and that form has passed into general use in the treaties of this country and is substantially identical with that of the Dominican treaty.

The various transformations that have been undergone by the phraseology under construction furnish the means of ascertaining the objects in view and the means by which it was proposed to accomplish them. The fountain-head from which its policy flowed was the plan adopted by the Continental Congress in 1776, in which we may study this policy in its germ. That this action of Congress was the actual origin of a large part of our diplomatic policy has been pointed out by one of the most distinguished writers on that subject. The fact that Congress at that time united in itself legislative and diplomatic powers confers upon its action in that case the combined qualities of a legislative and a diplomatic policy and entitles their action to receive thoughtful consideration.

Recurring to the incidents of the period in which the plan originated, we find that the necessity for alliances with some foreign power producing material aid was a stringent necessity of the American colonies, and yet the interests of commerce were not only remembered but received marked attention from Congress. The first articles of the proposed treaty with France as prepared by Congress related to commerce and was an effort to draw around the colonies the conditions of a commercial career.

The first two articles of the plan are devoted to the interests of commerce. The subjects of these articles are the impost duties imposed by the respective countries as affecting commercial intercourse between them and the freedom of navigation in both domestic and foreign carriage. The provisions relative to impost duties contemplate commercial intercourse between the two countries and the application to such intercourse of the principle that the rights and obligations existing under the domestic law shall be extended to the foreign trader.

Viewed independently of the circumstances surrounding the intended negotiation with France, there would appear to be little analogy disclosed by the respective declared purposes of the articles of the plan already referred to and the ninth article of the Dominican treaty, and not sufficient to establish a definite relation between them. The plan as it regards imposts merely equalizes the condition of the two nations relatively to each other without attempting to produce equality as it regards their respective relations to other countries, while the direct object of the ninth article of the Dominican treaty is to assure to the respective parties as great advantages in trade as are or may be enjoyed by any third party with such treaty powers. The plan attaches no consequence to the place of origin of the merchandise dealt in, but deals exclusively with the citizenship of the trader, while the ninth article of the Dominican treaty turns upon the question of the place of origin of the merchandise and is silent as to the conditions of citizenship of the trader. While it must be conceded that the ninth article of the Dominican treaty is not contained in the plan in form, yet we confidently believe that an examination of the internal conditions of the treating powers and their external relations at the time will disclose the fact that the provisions under construction were contained in principle in the plan.

At the date of the adoption of the plan the articles of confederation, though under consideration, had not yet been

adopted, and the thirteen colonies were, as they claimed, independent sovereignties, capable of shaping their relation to each other and to foreign nations in all matters, including commerce, according to their own ideas of policy. It was possible for any one of these colonies to admit to commercial privileges the citizens of one or more of its sister colonies and to exclude therefrom the subjects of foreign States. On the other hand, France had possessions in America, the trade with which constituted a leading interest here. The West India trade was a specially-coveted prize of our commercial enterprise and the French had possessions there. The colonies desired trade with the outlying possessions of France as unfettered by restrictive provisions as that which might be enjoyed with the mother country itself. The colonies, through their diplomatic representatives, the Congress, could offer inducements to France for concessions as it regarded trade with her colonies that grew out of the sovereign independence of the colonies. If the French subject could enjoy the privilege of trading in any one of the colonies on equal terms with the citizens of the other colonies a definite advantage would be derived that might induce the concessions desired as to trade with France and her dependencies.

Thomas Jefferson says in a letter to James Monroe in 1785:

"The difficulty which arises in our case is with the nations having American territory. Access to the West Indies is indispensably necessary to us, yet how to gain it when it is the established system of these nations to exclude all foreigners from their colonies."

In view of the situation and objects of the parties negotiating on the basis of the plan, it was to be regarded as a proposition to equalize the conditions of commercial intercourse between thirteen independent States on the one hand and a State and her colonial possessions on the other hand; and

thus contained a principle that might readily be expanded to embrace the entire family of nations. In the respect just mentioned the article under construction and the plan have a common purpose, although more limited in its application in the one case than in the other.

Article 11 throws light upon the character of the policy on which the plan was based. The expressed object of that article is to secure trade in the products of the West Indies, as against export duties imposed at such islands, on as favorable terms as that enjoyed by any other nation. The language of this article is to the effect that no higher or other duties shall be imposed on exportations of that character, using the language of the article, "than the lowest that are or shall be imposed on the exportation thereof to France or to any other part of the world." The fact that this article is in terms limited to export duties imposed in respect of the West Indies shows that that trade held a leading place in the thought of the American diplomatists at that time.

Provision had already been made by the previous articles 1 and 2 for the import trade, in a form that was controlled by the urgent necessity of securing trade with the West India possessions, on the same footing as that with the mother country, and it remained to provide for the case of export duties. The object in view in dealing with this subject was to place the United States on the same footing with all other countries, including France herself, as it regarded the imposition of export duties. There was nothing to prevent the export duties from being placed on the broadest ground of equality as it regarded all nations. There is no mistaking the force of the language used in this eleventh article. The mere fact that France or some other power might enjoy better terms as it regarded export duties would be a violation of any treaty based on its provisions, independently of whether the motive leading to the granting of such superior advantage was compensating gains or one of pure benevolence, if the last-named motive is ever found as the ground

of treaty concessions. While, then, articles 1 and 2 should be regarded as expressing the foreign policy of Congress as to commercial relations under limitations imposed by important local interests, article 11 should be regarded as a full expression of that policy in its broad sense. The policy thus exhibited bases the right of equalization upon a comparison of the laws or treaty stipulations under which export duties are regulated according to their effect, and not upon the indeterminate character of the motives that inspired them.

The further development of the general subject will show that the general intention thus derived from the plan was never lost sight of in the diplomacy of the country, but led to the adoption of the language of the ninth article of the Dominican treaty, where language is employed of the same import as that just considered.

The instructions adopted by Congress concurrently with the adoption of the plan offer to France an alternative proposition in the event of the rejection of the provisions of articles 1 and 2. This alternative conceded to each nation as against the other "the same privileges, liberties, and immunities at least and the like favor in all things which any foreign nation the most favored shall have." This provision would place the United States in their trade with France and her colonies in as favorable a position as any foreign state, but would not assure to her terms of trade with the colonies of France equal to those of French citizens.

The treaty with France in 1778 did not carry out the purposes of the plan, but was based upon the alternative proposition. It must be admitted that this treaty does not represent the commercial policy of the United States, but was the outgrowth of the necessity of an alliance with France in view of the relations then existing between the colonies and Great Britain. The absence from the plan of the expression *favored nation* or any equivalent expression, especially in the eleventh article, where it would naturally occur, and the substitution therefor of the language of that article, which has

since that time become common to that portion of our treaties that assumes to deal with the subject of import duties, must be regarded as a studied effort to get rid of that expression in its application to that subject—a purpose that failed in the instance of the treaty with France, and in fact was not accomplished until the treaty of 1794 was concluded with Great Britain. That such was the policy of our Government will clearly appear in the further development of the course of its diplomatic action.

As the treaty of 1794 with Great Britain was the first embodiment relative to import duties of the terms of article 11 of the plan as applied to exports, and as that language is substantially identical with the terms under construction, it is important to ascertain the conditions under which that treaty came into existence. As the result of that negotiation was to displace the *favored-nation* clause as propounded by Lord Granville and substitute therefor the American idea as finally adopted, it is apparent that the article in question was the product of American diplomacy, and therefore it is important to ascertain more exactly the nature and objects of that diplomacy.

Three important state papers and a letter from Mr. Jefferson that deserved and has received recognition as part of the public history of our country are of importance for the purpose just indicated. They are: The instructions of Congress to our ministers abroad in 1783 (secret journals of Congress, 3d vol., p. 412); instructions from Congress to ministers plenipotentiary, May 7, 1784 (secret journals of Congress, vol. —, p. —); letter of Thomas Jefferson to Mr. Monroe, dated June 17, 1785 (Jefferson's writings, N. Y., 1853, p. 349), and the instructions from Mr. Jefferson, as Secretary of State, to Mr. Jay, as minister to Great Britain, relative to the treaty of 1794. (American State Papers, Foreign Relations, vol. 1, p. 473.)

In the instructions of 1783 the basis of foreign treaties is stated as follows:

"In negotiating on this subject (amity and commerce) you will lay it down as a principle, in no case to be deviated from, that they shall, respectively, have for their basis the essential advantages of the contractiag parties on terms of the most perfect equality and reciprocity, and not be repugnant to any other treaties already entered into by the United States with France and other foreign powers."

In the following year, 1784, more precise instructions were issued by Congress, which, after naming certain States as proper subjects for the negotiation of treaties of amity and commerce, lays down the principles on which such treaties should be based, commencing as follows:

"*Resolved*, That in the formation of these treaties the following points be carefully stipulated:" It will be observed that, while the plan stated the form of treaty stipulations, the present instruction merely states principles to be observed in forming such treaties. The first paragraph of these instructions—that relating to commerce at large—is as follows: "1. That each party shall have a right to carry their own produce, manufactures, and merchandise in their own bottoms to the ports of the other, and thence the products and merchandise of the other, paying in both cases such duties only as are paid by the most favored nation, freely where it is freely granted to such nation, or paying the compensation where such nation does the same." The second paragraph relates to treaties with States having territories in America. The ninth paragraph declares "That these instructions be considered as supplementary to those of October 29, 1783, and not as revoking, except when they contradict them; that where in a treaty with a particular nation they can produce advantages, to the specification of which we have been unable to descend, an object in these instructions being to form outlines only and general principles of treaties with many nations, it is our expectation they will procure them, though not pointed out in these instructions, and where they may be able to form treaties on principles which, in their judgment, will be more beneficial to the United States than those herein directed to be made their basis they are permitted to adopt such principles." By these instructions commissions were ordered to issue to J.

Adams, B. Franklin, and T. Jefferson to negotiate such treaties and tender them to Congress for ratification.

That the instructions of 1784 represent a tentative policy and not one fully and finally settled is apparent from the latitude allowed to the commissioners in departing from the principles laid down, reserving to Congress the full and final consideration of such principles upon the ratification of treaties negotiated thereunder. Mr. Jefferson evidently entertained the opinion just stated as appears by his letter to Mr. Monroe already referred to. This letter is of importance not only as an exposition of the current policy on the subject of commercial relations, but as explaining the motives that lead to the avoidance of the expression *favored nation* in the treaty of 1794 with Great Britain under instructions from Mr. Jefferson, as Secretary of State. The letter written in the year following that of the ~~last-mentioned~~ instructions, of 1784 after stating as a reason for a general system of treaties with foreign powers that under the Articles of Confederation Congress could only control commercial intercourse with foreign nations through the medium of treaties, states his views as follows. Speaking of the language that should be addressed to foreign countries by the United States, he says: "I would say, then, to every nation on earth, by treaty, your people shall trade freely with us and ours with you, paying no more than the most favored nation in order to put an end to the right of individual States to interrupt our commerce and to embroil us with any nation." After considering the plans of avoiding duties altogether and of equalizing those duties as between States maintaining commercial relations, and dismissing them as impracticable, he states as follows:

"I confess, then, to you that I see no alternative left but that which Congress has adopted, of each party placing the other on the footing of the most favored nation. If the nations of Europe from their actual establishments are not at liberty to say to America that she shall trade in their ports, duty free, she may say she may trade there, paying no

higher duties than the most favored nation, and this is valuable in many of these countries where a very great difference is made between different nations.

"There is no difficulty in the execution of this contract, because there is not a merchant who does not know or may not know the duty paid by every nation on every article. This stipulation leaves each party to regulate their commerce by general rules, while it secures the other from partial and oppressive discriminations."

We have here Mr. Jefferson's understanding of what was the nature and operation of the first paragraph of the instructions of 1784, and in what sense the expression *favored nation* was used in that instrument. Had Mr. Jefferson been called upon to construe the words "paying, in both cases, such duties only as are paid by the most favored nation freely where it is freely granted to such nation, or paying the compensation where such nation does the same," as constituting the actual phraseology of an article of a treaty, the application of technical rules might have forced him to a more rigid interpretation, but Congress had not attempted to settle the language of treaties, but had expressly declared that it only sought to recognize principles, leaving their development and application to the distinguished commissioners, one of whom is speaking in the letter under consideration.

According to Mr. Jefferson the policy in question would involve three important features: It would exclude differences made between different nations to our prejudice; it would compel the imposition of duties by general rules, thus excluding special privileges granted to one and not to another, and by placing duties upon the sanction of general laws would enable merchants to know the measure of their rights in all countries by the inspection of the laws of such countries.

He states as an advantage to be derived from such treaties that they would be valuable in many of the countries of

Europe, "where a very great difference is made between different nations." There is no suggestion that these differences will be overcome in our favor, only to the extent that they are based upon uncompensated concessions and are thus instances of favor, for in the complicated state of political relations among the countries of Europe instances would be rare where treaty privileges were granted without some compensating advantages, either commercial or political. The plain import of Mr. Jefferson's views is that such differences could not operate against us under treaties of that character, upon whatever ground they might rest. This conclusion is strengthened by the statement that "there is no difficulty in the execution of this contract because there is not a merchant who does not know or may not know the duty paid by every nation on every article." If the right of the merchant in a foreign country was made to depend upon the motive or considerations that induced a concession to a third country it could not be said that the contract was without difficulty in its execution, for every question of difficulty arising under such a construction would have to be worked out by the political authorities of the two nations, and that is precisely the case of a *difficulty* in execution. Mr. Jefferson says that the merchant could determine his rights by an inspection of the laws of the respective countries concerned, and merely by ascertaining the "duty paid by every nation on every article." If the solution of questions arising under such treaty stipulations involved an inquiry into the advantages and considerations that induced the granting of a discriminating privilege and exact equalization of the relations of the treaty powers to correspond with those of the grantor and the recipient of such privileges, the treaty would not only not be free from difficulty in execution, but would involve the most complex process of solution known to the diplomatic art. The clear import of Mr. Jefferson's statement is that such treaty stipulations would be self-executing in the view of the laws imposing duties and unaffected by

other considerations. This is distinctly indicated in the statement that every merchant familiar with the laws of the several countries would have the means of ascertaining his rights as it regarded duties imposed by a power with whom his government had such treaty regulations.

The exposition of the views of Mr. Jefferson that has been already advanced is the only one that can lead up to the statement made by him, that "this stipulation leaves each party at liberty to regulate their commerce by general rules." Liberty to regulate commerce by general rules implies the absence of liberty to make it the subject of special arrangements, involving privileges to one not enjoyed by the other. The liberty referred to is that which is left after something is taken away, and is defined by the expression *general rules*.

Mr. Jefferson here enunciates a principle that has become interwoven with the entire fabric of our national policy, and as an advanced step in the direction of enlightened international intercourse is distinctly American, both in its liberal spirit and in the means by which it has been made practically efficacious. It aimed to disentangle commercial interests from complications with political objects and interests, to place the imposition of duties upon the basis of general laws acting impartially on all foreign States, and to make the equalizing stipulations of treaties affecting import duties self-executing.

Mr. Trescot, in his American Diplomatic History, speaking of the condition of European diplomacy in its relation to the first paragraph of the instructions of 1784, says, at page 20, that these provisions were contrary to the "principles of both British and Spanish trade," and admitted by France only in a qualified sense. He further says, at the same page: "The close of the last century was emphatically an age of commercial alliances, but alliances negotiated on the principles of the strictest monopoly and based entirely upon an exchange of mutual advantages." Of Jefferson, he says, at page 24: "The chief object of the Jeffersonian efforts

was to attain a broad and permanent commercial arrangement by which the trade between the two countries might be as free as the interests of both most fully required."

European diplomacy was, at the time referred to, an interwoven fabric of commercial and political questions, the last named including such as were territorial and dynastic. The mutual advantages that were to be sought were complicated with all these motives, and commerce could not reach a proper organization on the principles of competition. The corrective for such a condition was that employed by Jefferson, namely, separate the interests of commerce from political interests in diplomatic treatment and deal with them according to their proper nature. As having the broadest influence on commerce, the subject of import duties was selected for separate treatment from the other elements of commercial interests. The great corrective, as it regarded import duties, was to place their imposition on the basis of general laws offering impartial conditions of trade to all nations, and making these laws effective by imposing countervailing duties upon nations that would not respond to such a system. Our legislation followed this system down to a recent period, imposing all duties by general laws, in respect of which all nations were intended to stand on terms of equality. A departure from this uniform method occurred in the instance of the reciprocity treaty affecting Canadian trade, but as this treaty did not affect any of the staples of general commerce, but was confined to the regulation of local trade alone, the instance may be regarded as a departure from the principle in an abstract sense only, not entailing the consequences that would have resulted had it been an interference with the principle in application to general commerce. The Hawaiian treaty was the first departure from the legislative policy thus indicated, affecting the general commerce by operating upon one of the great staples.

Such a legislative system demanded the acceptance of its principles by foreign governments, and this was the proper

work of diplomacy. That policy implied the relinquishment of all advantages in foreign trade that might be attained by means of duties discriminating in favor of those with whom we sought special privileges and against others, and the adjustment of treaty relations to the same principle was essential to the complete success of the policy. While America put herself on terms of equality with all nations as it regarded the imposition of domestic duty, she could claim no less of any other power with whom she was treating than that she should be put in her dealings with such power on terms of equality with all other nations, and such was the essential character of the scheme proposed by Mr. Jefferson. The European idea of equality was much more limited than the American idea, and was based upon the assumed legitimacy of using the power to impose duties as a means of securing advantages in trade, and consisted in letting the State seeking equal advantages with another into the bargain upon the same terms as the privileged State. The American idea of equality was based on the conception that employing the power of imposing duties for the purpose of gaining trade advantages, or any other class of special advantages, was inconsistent with the interests of commerce; hence equality according to the American policy meant actual equality, without regard to what may have been gained or lost by the inequalities sought to be got rid of. This is the conception embraced in Mr. Jefferson's letter, and the only one that could attain that which he desired, namely, the equalizing to America of the conditions of the discriminating system of Europe.

The system of general laws regulating duties had the advantage of reducing the obligations of the importer to certainty and protecting his rights by judicial remedies, and to complete the system it was necessary that such treaties as participated in fixing duties should have the force of municipal law, and this quality was conferred upon them by our Constitution. It was necessary in order to complete the sys-

tem that means should be afforded for comparing together the duties imposed by nations connected by treaties attempting equalization, and for this purpose it was requisite that the laws of the respective countries should contain all the means necessary for the determination of the duties imposed by them, respectively, and for this purpose that treaty obligations should be made to depend wholly on the state of such laws. It was such a condition of treaty adjustments that Mr. Jefferson had in view when he said, "There is no difficulty in the execution of this contract, because there is not a merchant who does not know, or may not know, the duty paid by every nation on every article."

Having obtained a clear conception of the policy of Mr. Jefferson, the question arises whether that policy became actually engrafted upon the diplomacy of the country. As bearing on the answer to this question the instructions given by Mr. Jefferson to Mr. Jay, the former being Secretary of State and the latter minister to Great Britain, becomes important. A treaty with Great Britain was then under consideration which was afterwards concluded in 1794, and these instructions related to that treaty. Mr. Jefferson in stating various points deserving attention on the part of the minister says: "7th. The exclusion of the terms *most favored nation*, as being productive of embarrassments." This instruction controlled the form of the treaty, for although Lord Granville had submitted a scheme that included the usual favored-nation clause, it was stricken therefrom in the treaty as concluded, and the language of the eleventh article of the plan of 1776 was adopted in substance. If it should appear that the rejection of the phrase favored nation in this treaty was the consequence of the application to it of the principles laid down by Mr. Jefferson as just stated, then it must be considered that that policy had become embodied in the treaty and may be regarded as means of interpreting the language of that treaty, and for like reason the same language wherever it occurred in future treaties, especially as

that language was significant of a modification of previous modes of dealing with the same subject. It only remains, then, to connect the instruction to Mr. Jay with the general policy expressed by Mr. Jefferson, as already stated.

From Mr. Jefferson's stand-point the favored-nation clause was objectionable for various reasons. In the first place, it was part and parcel of the system of obtaining advantages in trade by discriminations in the imposition of duties, and its actual effect, if applied, was to establish communities of interest in the advantages secured by such objectionable discriminations. As the relations of States were not determined in the system of Europe by sentimental considerations, but, as it regarded commerce, as said by Mr. Trescott, as already quoted, were based "on the principles of the strictest monopoly and based entirely on the exchange of mutual advantages," the process of assimilating the relations of two treaty powers to those existing between one of such powers and a third privileged nation, upon the same or equivalent considerations, was too cumbersome for practical use, and one that could only be performed by the political power, and hence the favored-nation clause was practically a dead letter. As the idea of Mr. Jefferson of an efficacious means of ascertaining the duties payable from an inspection of the laws of the various countries concerned is altogether inconsistent with the means afforded by the favored-nation clause, it explains the nature of those embarrassments that, according to his statement, were produced by that clause.

If the considerations that have been adduced from the public history of our diplomacy tended to contradict the plain import of the terms of the article under construction, their force might be impaired, but where, as in the present case, an effort is made by the Government to strain the construction of the terms used from their natural import, such considerations become of great significance.

Article ninth of the Dominican treaty declares, reduced to the simplest expression, that Dominican produce shall

pay the United States no higher or other duties than are paid on the products of any other country. The negative form of statement is all that exposes its text to the most adroit criticism. Suppose it had read that such produce should pay higher duties than those of any other country, in that case higher than the highest duties paid by any other country would be demandable. The introduction of the word *no* before *higher* cannot possibly have the effect of changing the entire sense of the terms. An analogous instance is a grant of the usufruct of his land by A to B, not less than that enjoyed by any other person. In that case the largest right possessed by any other person than A would be the least measure of B's right. If there was any obscurity in the text it would be cleared up by the fact that its object was to equalize the condition of the contracting parties with that of the nation possessing the greatest advantages as regards import duties derived from such parties. This purpose is apparent on the face of the treaty and is fully illustrated by the references that have been made to diplomatic history.

The same form of expression employed in the first paragraph of the ninth article of the Dominican treaty of 1867 is in the second paragraph of that article applied to duties on exports, and, although the subject differs, the object must be regarded as the same, and hence the same force should be given to the same expression used in both cases. There can be no doubt as to what is meant by the expression "any other foreign country" as it regards export duties, and the intention is clear that the best conditions as regards the maximum of export duties allowed to any country shall equally be allowed to the Dominican Republic. If it is said, in regard to any privilege allowed in that respect to a third nation, that the United States received an equivalent for such grant, the ready answer is that the Dominican Republic bargained for all advantages and presumably gave an equivalent therefor as the consideration of what it sought. To

imply from the Dominican treaty a promise on the part of the Dominican Republic to pay for any advantages acquired under the treaty what the holder of such advantage had paid to acquire it would be to apply the principle that when one, by a contract upon consideration, purchases a right or thing he impliedly agrees to give, in addition to the stipulated price, that which the holder of such right or thing gave for it. It is not necessary to argue the fallacy of such a proposition in this court.

If the construction that has already been put upon the ninth article of the Dominican treaty is sound, then it excludes all special arrangements between the United States and any foreign power that are not subject to the principle of equalization propounded by that article. It is the nature of an agreement between persons to equalize their conditions in respect of all other persons to exclude special agreements tending to disturb that equilibrium. If the right to make special agreements for special privileges can ever be reconciled with a general treaty excluding preferences of one power over another, it would be in the case of the relations of a mother country to her dependencies, politically united to her, though possibly territorially and commercially distinct.

We venture to affirm that no such right has been recogized as existing in the diplomatic intercourse of nations, but, on the contrary, the opposite has been assumed, if not asserted. When the treaty of 1815 was negotiated with Great Britain, if intimacies of relation between States could have varied the effect of treaties of commercial equalization, Great Britain might have said that under the terms of the treaty of 1794 she would still possess the right to make what arrangements she pleased with her own colonies, notwithstanding the general terms of the treaty last named, in view of her intimate relations with her colonies; but she relied on no such doctrine, and demanded that her treaty should

be in terms confined to her possessions in Europe, and that point was yielded by the United States.

When it is considered that the leading object in concluding the treaty of 1794 with Great Britain was to secure as good terms of trade with the West India colonies of Great Britain as were obtained from the mother country, it is evident that our statesmen believed that the general terms of that treaty would exclude Great Britain from making special conditions with her colonies from which the United States might be excluded consistently with that treaty. Both of these countries seem to have held the same views on this subject at that time.

In the treaty of 1828 with Brazil, where the same provision as that contained in the ninth article of the Dominican treaty is found, the following passage appears: "It is understood, however, that the relations and conventions which now exist, or may hereafter exist, between Brazil and Portugal shall form an exception to this article." This is a distinct recognition that international intimacies afford no ground for exceptional arrangements to that general rule of equalization laid down by such articles as that under construction.

In the treaty with The Netherlands of 1782, while based on the provisions of the treaty of 1778 with France, as it regarded the subject of imports, care is taken by express provisions to except the possessions of that government in the East and West Indies from its operation.

The treaty of 1800 with France, based on the provisions of the previous treaty of 1778 as it regards imports, is in terms confined to the possessions of that power in Europe.

It is not necessary to go any farther in order to be able to demonstrate the proposition that it has been the habit of intercourse between ourselves and the nations with whom we have treated for commercial privileges to name expressly all intended exceptions to the generality of the expressions

used that were intended by the parties, and such a habit of dealing obviously enters into the construction of the treaties concluded in such intercourse.

It will be an unenviable distinction if America, after having successfully antagonized the petty system of international traffic in monopolies of trade, and after having founded and maintained for a century a broad and generous system, bringing international commerce into just relations to the causes on which the development of civilization depends, should not only abdicate that honorable position, but deny the force of the very obligations she has assumed for the accomplishment of that object. Fortunately, such a result cannot be reached until this Court gives its sanction to the construction claimed by the executive government, which, in our judgment, cannot take place without subverting the very foundations upon which its dignity and historic character rest.

A. J. WILLARD,
*Of Counsel for Plaintiff in Error.*

# SUPREME COURT OF THE UNITED STATES

*October Term*, 1887—*No.* 108.

JAMES F. WHITNEY, HENRY BUSCHMANN, AND CHARLES S. WHITNEY, PLAINTIFFS IN ERROR,

*vs.*

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK.

## BRIEF FOR PLAINTIFFS IN ERROR.

The foregoing briefs and argument for plaintiff in error in the case of Hugh Kelly, plaintiff in error, *vs.* Edward L. Hedden, collector, etc., defendant in error, October term, 1887, No. 108, are designed to apply also to this case, and are hereby incorporated as part of this brief.

The following only is required by way of any additional

### *Statement.*

In the case of Whitney against Robertson judgment was also rendered sustaining the defendant's demurrer in the court below to the plaintiff's complaint. The complaint and demurrer were the same as the complaint and demurrer in the case of Hugh Kelly against Hedden (No. 1012), except in respect to the date and other particulars of the importations on which the alleged illegal duty was exacted. The importations occurred in the year 1882, and therefore the laws in force prior to the existing tariff of March 3, 1883, applied. The merchandise was sugars, conceded by the de-

murrer to have been "of such kinds and grades that if they had been produced or manufactured in the Hawaiian Islands instead of the Dominican Republic they would have been admitted to the ports of the United States free of duty" under the Hawaiian treaty and the act of Congress passed August 15, 1876. (Record, fol. 8.)

The only judicial question in this case which the Government can raise to distinguish it from the foregoing case arising under the existing tariff comes from the circumstances of the *date of the importation*, and a consequent claim that a different condition of statutes applies to the Whitney case than that exhibited in the foregoing brief for the Kelley case.

*Assignments of Error.*

It was error for the court below to sustain the demurrer and give judgment for the defendant, because the facts stated in the complaint exhibited a perfect cause of action, which could only be defeated by successfully controverting the allegation touching the character and origin of the merchandise imported.

I.

Adopting all of the considerations and arguments advanced in the foregoing briefs and arguments in this behalf in the case of Kelly *vs.* Hedden, it is only necessary to allude to the chronology of the various laws applicable to sustain the proposition that the exemption as contended for by plaintiff in error in the Kelly case apply without diminution resulting from any act of Congress and with full force and effect to an importation made in the year 1882.

The law that *no other* duties *shall be* payable upon Dominican products than are or *shall be* payable on *like products* from *any other country* was made for the United States October 24, 1867.

This "supreme law of the land" became immediately operative when the enactment passed August 15, 1876, by

its terms took effect, and this was from the date of a proclamation to be made by the President, as in said act specified. This proclamation was made, pursuant to that statute, September 9, 1876 (19 U. S. Stat. at L., p. 666). In accordance with said act of Congress of August 15, 1876: "From the date of such proclamation the following articles, being the growth and manufacture or produce of the Hawaiian Islands, to wit, * * * muscovado, brown, and all other unrefined sugar, meaning hereby the grades of sugar heretofore commonly imported from the Hawaiian Islands, and now known in the markets of San Francisco and Portland as 'Sandwich Island sugar,' sirups of sugar-cane, melada, and molasses, tallow, shall be introduced into the United States free of duty so long as the said convention shall remain in force."

Hence, from and after September 9, 1876, Dominican sugars of the grades corresponding and, as merchantable commodities, *like* the sugars specified from the Sandwich Islands, "*shall be* introduced" free of duty as long as the Hawaiian treaty shall remain in force. That treaty was in force in September, 1882, the date of the importation and payment in question, unless there appears between 1876 and 1882 some intervening law.

After 1876, and before the importation in question, there was no legislation whatever affecting the tariff on sugars.

The only legislation under color of which the Government claimed to exact the duties in question was the prior legislation covered by section 3, act of March 3, 1875 (18 U. S. Stat. at L., p. 339), imposing a duty of twenty-five per cent. upon sugar additional to the duties prescribed on such specified sugars according to Schedule G of section 2504 of United States Revised Statutes, which was the general tariff on sugars and all other articles. No other legislation has been claimed to apply, and this legislation, being prior to the legislation of 1876, is claimed by plaintiffs in error to have no application to the case at bar.

II.

If, after September 9, 1876, any act of Congress affecting generally the rates of duty upon the merchandise in question had been enacted, the serious question might then have been presented as to how far, in the absence of an express intention to that effect, such enactments might have intruded upon the full force and effect of treaty stipulations. As, in no view of the case at bar, can this question possibly be presented with any propriety, counsel for plaintiffs in error withhold discussion upon it. It is enough for all the purposes of this case that anterior to the importation in question no act of Congress has, directly or indirectly, infringed or in any wise purported to infringe upon the force and effect of the act of Congress approved August 15, 1876, and the stipulations in the Dominican treaty thereby made operative.

Nor has any political action been taken by any department or officer of the Government declaring either of the conventions herein mentioned or the act of Congress appertaining to them at an end.

The substantial issue in the case at bar, therefore, is, What shall be done by the judiciary department in a proper case calling for the fulfillment of these conventions?

That the situation is one calling for the direct exertion of judicial authority there can be no question. In a House report of a committee of the Senate and House of Representatives Mr. Forsyth, chairman, declared that all were agreed on the principle that how far legislation might be required to carry out treaty provisions "must be founded upon the peculiar character of the treaty itself." (Davis' U. S. Treaties, p. 944.) In 6 Op. Att'y Gen'l, 297, it is said: "Whether any legislation be necessary or not depends on the conditions of the treaty compared with the provisions of the existing law pertaining to the subject-matter." The

"subject-matter" in the case at bar is imposts, dependent upon a competent conclusion of the United States Government touching imposts in 1882 on products from "*any other* country" except Dominica and including Dominica. The "existing law pertaining to imposts on like products from *some* other country (*i. e.*, Hawaii) is to be ascertained." When ascertained the necessary conclusion follows that *like* Dominican products were subject to *no other* imposts. It required no act of Congress to assist in either of these ascertainments. The process is a ministerial or judicial one.

Suppose that a treaty (as article 2, treaty 1803) did provide that the inhabitants of certain territory ceded to the United States should enjoy all the "rights, advantages, and immunities of citizens of the United States" and be "protected in the free enjoyment of their liberty, property, and the religion which they profess, and an appeal should be made to the judiciary to enforce such an article in a proper case, could the courts respond that Congress must first legislate *how* that shall be done, under every conceivable state of facts, before the judicial arm shall exert itself in aid of such a treaty? This Court, having the language of such a treaty before it (in *U. S.* vs. *Reynes*, *9th How.*, 151), proceeded to regard it and to construe its meaning, and to define the word "property" as there used. Another illustration of the action of this Court in giving liberal construction, according to the spirit and well-known intent of a treaty, is found in the case of *Chew Heong* vs. *U. S.*, 112 *U. S. R.*, *p.* 536, where subsequent to the treaty Congress had legislated in terms apparently broad enough to exclude the operation of the treaty. This Court, however, gave such a construction, both to the statute and to the treaty, as to harmonize each with the other, in accordance with the historic design of the treaty, thus applying the established principles of international law towards the accomplishment of the purposes of the high contracting powers and avoiding the unjustifiable

result of construing possibly ambiguous legislation so as to impair the obligation of a treaty.

It is the spirit of harmonious construction and fair operation that is relied upon to secure the application of unimpaired treaty provisions to the persons and property involved in the case at bar. That no legislation is required in the instance of the case at bar has been demonstrated elsewhere in these arguments.

This Court has settled the full force and effect of treaty stipulations generally and the obligations of the judiciary concerning their fulfillment. This is not a case where Congress has attempted any act, since the provision in the Dominican treaty became immediately applicable to such a case as the one at bar, calculated to interfere with such applicability. It is only the *executive* department of the Government, through one of its subordinates, that has attempted intrusion upon the treaty, and the single question in the case at bar is, *Was that intrusion justifiable?*

It may be conceded, as said by Miller, J., in the Clinton Bridge case (Woolworth, 155–'6), that the courts possess no power to declare a statute passed by Congress and approved by the President void because it may violate a treaty (Amiable Isabella, 9 Wheat., 1). Questions of this class are international questions, to be settled between the foreign nation interested and the political department of our Government. It may be conceded that "when those departments declare a treaty abrogated, annulled, or modified it is not for the judicial branch of the Government to set it up and assert its continued obligation" (6 Wall., 75). In this instance there is no such abrogation, express or implied, and the defendant collector is without power to annul a treaty. If such power be assumed—as it was practically assumed in this case—the judiciary will apply the remedy. In the case at bar this Court is, therefore, called upon to interpret and to apply the treaty and to determine, in disposing of the resistance of the collector to its application, whether that

resistance is by proper authority, and *whether either Congress or any governmental authority has in any wise intruded upon the operation of the treaty article in question and upon the co-ordinate obligation of the United States judiciary department to enforce this treaty as part of the municipal law of the land.*

III.

The opinion of the court below, supposed by it (Record, fol. 19) to control the case at bar, is the opinion rendered in the case of *Bartram* vs. *Robertson* (15 Fed. Rep., 212). In so far as that opinion essayed to find some act of Congress that limited, qualified, or contravened the full force and effect of treaties, such opinion has been adversely disposed of in the opinion delivered by this Court upon the final determination of that case (122 U. S., p. 116). The absence in the opinion of this Court of any allusion to the peculiar reasons stated by Mr. Justice Wallace for the result he arrived at in his opinion indicates the acceptance by this Court of so much of the contentions submitted by counsel for plaintiffs in error in that case as was included in their proposition that there was no legislation to impair the particular international obligations then under consideration. The opinion of this Court implies no other conclusion; and the final determination of that case was made, through the opinion of Mr. Justice Field, exclusively dependent upon the peculiar character of the special treaty stipulations in the Danish treaty, stipulations which are not found in the Dominican treaty. Indeed, arguments on this special topic may be summarized in the apparent attitude of the Court, implied by its final opinion and in the question propounded by the Chief Justice to counsel upon the argument, when he asked the latter if their proposition was that the acts of Congress and the treaty provisions should, if possible, be so construed as to harmonize with each other. It was then submitted, and apparently with success, that such harmony did exist, and it will not

be further argued here that this inevitable harmony should remain unimpaired by any action of the Judiciary Department.

It is, therefore, confidently submitted as a sound and incontestible fact that Congress has not interfered with the operation of article 9 of the Dominican treaty.

NOTE.—Inasmuch as some of the observations of this Court (in the Cherokee tobacco case, 11 Wall., 616) as to how far acts of Congress would supervene when in conflict with treaty provisions have been repeated in subsequent cases decided, however, upon other grounds, it is proper in this point to invite attention to the circumstance, which somehow seems to have escaped consideration, that in the Cherokee treaty there was an article expressly reserving to Congress the right to enact legislation of the character that was held to apply to the Cherokees in that case.

In further verification, if need be, of the contentions in the case at bar that there is no legislation adverse to the propositions submitted in behalf of the plaintiffs in error, reference is hereby made to the briefs filed in this Court in the case of Bartram *vs.* Robertson, No. 275, October term, 1886.

## IV.

It is submitted that the propositions embraced in the recapitulations with which the foregoing briefs and arguments, entitled in the case of Kelly *vs.* Hedden, conclude, are immediately applicable to the determination of the issues presented in the present case of Whitney *vs.* Robertson; and to these conclusions and the considerations upon which they are based nothing need be added except a supplementary one framed to anticipate a possible repetition by the Government of the claim made by it in the court below touching the intrusion of Congressional enactment upon the force of the Dominican treaty; that—

No legislation has interfered or attempted to interfere with the full force and effect which should be given since September 9, 1876, to article 9 of the Dominican treaty. It

therefore follows that the duties in this case were illegally exacted and that the judgment below should be reversed.

Dated Washington, December 6, 1887.

HENRY EDWIN TREMAIN,
MASON W. TYLER,
*Of Counsel.*

TREMAIN & TYLER,
167 *Broadway, N. Y.*

124-190

DEC 10 1887
JAMES H. MCKENNEY
CLERK

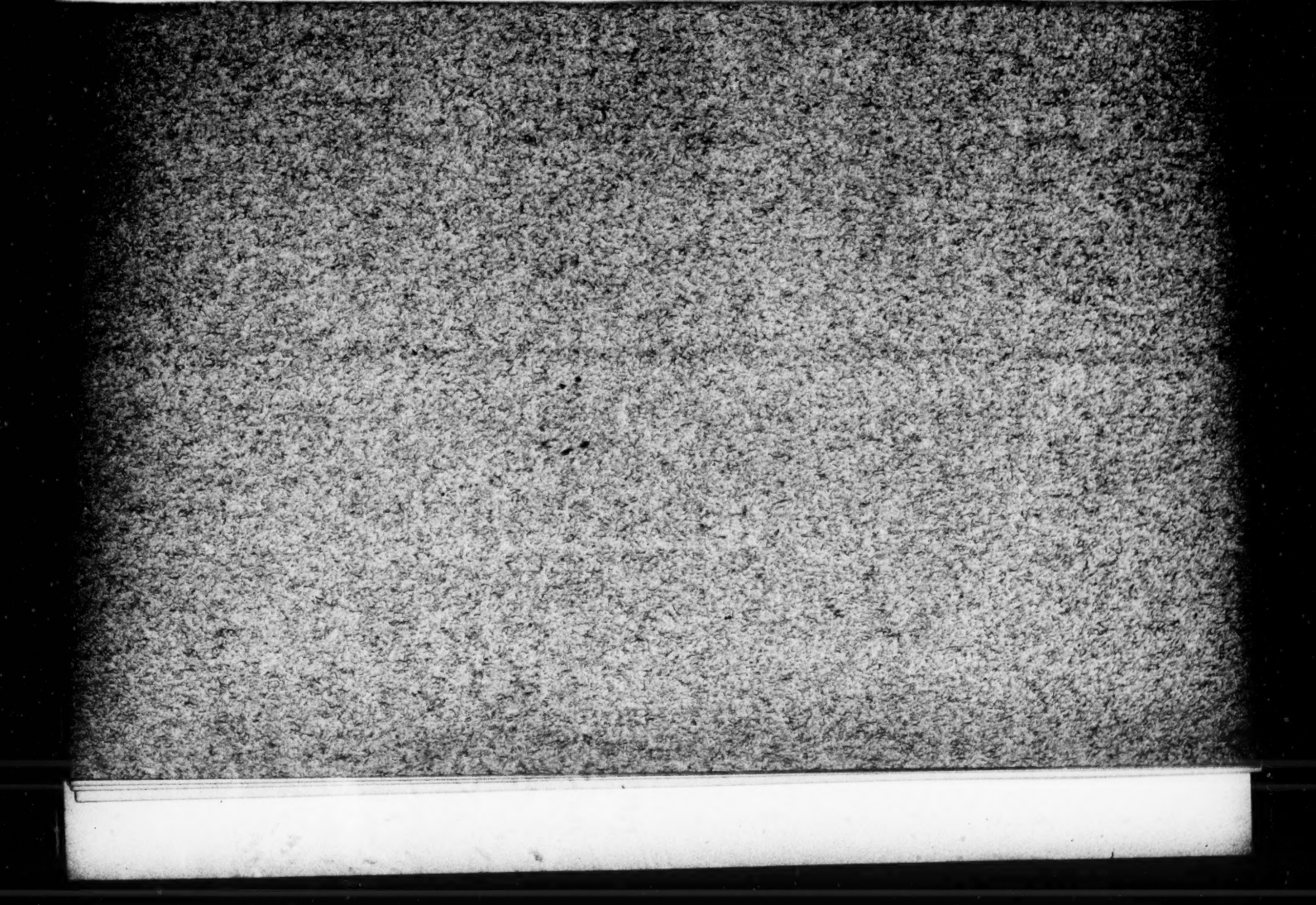
# In the Supreme Court of the United States.

OCTOBER TERM, 1887.

JAMES F. WHITNEY, HENRY BUSCHMANN, and CHARLES S. WHITNEY, plaintiffs in error,
*vs.*
WILLIAM H. ROBERTSON, COLLECTOR of the port of New York.
No. 108.

HUGH KELLY, PLAINTIFF IN ERROR,
*vs.*
EDWARD L. HEDDEN, LATE COLLECTOR of the port of New York.
No. 1012.

*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*



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**BRIEF OF ARGUMENT FOR DEFENDANTS IN ERROR.**

The questions involved in the two cases stated are substantially the same, except that in the case last stated the importation was made after the passage of the tariff act of March 3, 1883, the 11th section of which provides that "nothing in this act shall in any way change or impair the force or effect of any treaty between the United

States and any other Government, or any laws passed in pursuance of or for the execution of any such treaty, so long as such treaty shall remain in force as to the subjects embraced in this act."

In the view we take of the cases, this act has no material bearing.

In the first case, the plaintiffs imported sugar from the Dominican Republic on the 23d of August, 1882, on which the collector of the port of New York collected from them duties to the amount of $21,936.21, which was the just amount payable under the tariff act applicable to the importation at that time.

In the second case stated, the plaintiff, in July and August, 1885, imported sugar from the same Republic, and duty was levied thereon, according to law, to the amount of $2,121.80.

The plaintiffs claim the sugar should have been admitted free, because the United States, on the 19th of September, 1876, made a treaty with the Hawaiian Islands to admit sugar, a product of those islands, free.

The treaty with the Hawaiian Islands, proclaimed September 9, 1876 (19 Stat. L., 625), consists of a preamble, a conclusion, and the following five articles:

> The United States of America and His Majesty the King of the Hawaiian Islands, equally animated by the desire to strengthen and perpetuate the friendly relations which have heretofore uniformly existed between them, and to consolidate their commercial intercourse, have resolved to enter into a convention for commercial reciprocity.
>
> * * * * *

## ARTICLE I.

For and in consideration of the rights and privileges granted by His Majesty the King of the Hawaiian Islands in the next succeeding article of this convention, and as an equivalent therefor, the United States of America hereby agree to admit all the articles named in the following schedule, the same being the growth and manufacture or produce of the Hawaiian Islands, into all the ports of the United States free of duty.

### SCHEDULE.

Arrow root; castor oil; bananas; nuts, vegetables, dried and undried, preserved and unpreserved; and skins undressed; rice; pulu; seeds, plants, shrubs, or trees; muscovado, brown, and all other unrefined sugar, meaning hereby the grades of sugar heretofore commonly imported from the Hawaiian Islands, and now known in the markets of San Francisco and Portland, as "Sandwich Island sugar;" sirups of sugar-cane, melado, and molasses; tallow.

## ARTICLE II.

For and in consideration of the rights and privileges granted by the United States of America in the preceding article of the convention, and as an equivalent therefor, His Majesty the King of the Hawaiian Islands hereby agrees to admit all the articles named in the following schedule, the same being the growth, manufacture, or produce of the United States of America, into all the ports of the Hawaiian Islands, free of duty.

### SCHEDULE.

Agricultural implements; animals; beef, bacon, pork, ham, and all fresh, smoked, or preserved meats;

boots and shoes; grain, flour, meal and bran, bread and breadstuffs, of all kinds; bricks, lime, and cement; butter, cheese, lard, tallow, bullion, coal, cordage; naval stores, including tar, pitch, rosin, turpentine, raw and rectified; copper and composition sheathing; nails and bolts; cotton and manufactures of cotton, bleached and unbleached, and whether or not colored, stained, painted, or printed; eggs; fish and oysters, and all other creatures living in the water, and the products thereof; fruits, nuts, and vegetables, green, dried, or undried, preserved or unpreserved; hardware; hides, furs, skins, and pelts, dressed or undressed; hoop-iron and rivets, nails, spikes, and bolts; tacks, brads, or sprigs; ice; iron and steel, and manufactures thereof; leather; lumber and timber of all kinds, round, hewed, sawed, and unmanufactured in whole or in part; doors, sashes, and blinds; machinery of all kinds, engines and parts thereof; oats and hay; paper, stationery, and books, and all manufactures of paper or of paper and wood; petroleum and all oils for lubricating or illuminating purposes; plants, shrubs, trees, and seeds; rice; sugar, refined or unrefined; salt; soap; shooks, staves, and headings; wool and manufactures of wool, other than ready made clothing; wagons and carts for the purposes of agriculture or of drayage; wood and manufactures of wood, or of wood and metal, except furniture either upholstered or carved and carriages; textile manufactures, made of a combinantion of wool, cotton, silk, or linen, or of any two or more of them other than when ready-made clothing; harness and all manufactures of leather; starch; and tobacco, whether in leaf or manufactured.

## Article III.

The evidence that articles proposed to be admitted into the ports of the United States of America or

the ports of the Hawaiian Islands free of duty, under the first and second articles of this convention, are the growth, manufacture, or produce of the United States of America or of the Hawaiian Islands respectively, shall be established under such rules and regulations and conditions for the protection of the revenue as the two Governments may from time to time respectively prescribe.

ARTICLE IV.

No export duty or charges shall be imposed in the Hawaiian Islands or in the United States upon any of the articles proposed to be admitted into the ports of the United States or the ports of the Hawaiian Islands free of duty, under the first and second articles of this convention. It is agreed on the part of His Hawaiian Majesty that so long as this treaty shall remain in force he will not lease or otherwise dispose of or create any lien upon any port, harbor, or other territory in his dominions, or grant any special privilege or rights of use therein to any other power, state, or Government, nor make any treaty by which any other nation shall obtain the same privileges relative to the admission of any articles free of duty hereby secured to the United States.

ARTICLE V.

The present convention shall take effect as soon as it shall have been approved and proclaimed by His Majesty the King of the Hawaiian Islands, and shall have been ratified and duly proclaimed on the part of the Government of the United States, but not until a law to carry it into operation shall have been passed by the Congress of the United States of America. Such assent having been given and the ratifications of the convention having been exchanged

as provided in Article VI, the convention shall remain in force for seven years from the date at which it may come into operation; and further, until the expiration of twelve months after either of the high contracting parties shall give notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said term of seven years, or at any time thereafter.

The claim of the plaintiffs is based upon the ninth article of the treaty between the United States and the Dominican Republic, ratified the 20th day of March, 1867 (Rev. Stats., U. S., Public Treaties, p. 180), which is:

No higher or other duty shall be imposed on the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic, or of her fisheries; and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article the growth, produce, or manufacture of the United States or their fisheries, than are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country, or its fisheries.

No other or higher duties or charges shall be imposed in the United States on the exportation of any article to the Dominican Republic, nor in the Dominican Republic on the exportation of any article to the United States, than such as are or shall be payable on the exportation of the like article to any other foreign country. No prohibition shall be imposed on the importation of any article the growth, produce, or manufacture of the United States or their fisheries, or of the Dominican Republic and her fisheries, from or to the ports of the United States or the Dominican Republic, which shall not equally extend to every other foreign country.

The treaty with the Hawaiian Islands is substantially a commercial contract by which the Hawaiian Islands pay a valuable consideration for the admission of certain merchandise into the ports of New York. The first article declares that, for a consideration and equivalent to be paid by the Hawaiian Islands to the United States, sugar and certain other articles the produce of the islands shall be admitted free of duty. The consideration to be paid to the United States is stated in the second and fourth articles. It is special and valuable, aggregating large annual amounts. It is of substantial pecuniary value. The language "free of duty," in the treaty, does not mean that no duty or equivalent for duty is or shall be paid, but free from a duty to be charged and collected from the importer at the port when the entry is made. The importations are not free, but the nation whence the importation comes has made a special bargain by which the nation, and not the importer, pays the duty.

There is no allegation in the plaintiff's declaration that the compensation paid by the Government of the Hawaiian Islands for the sugar exported to the United States was less *ad valorem* than was paid by importers from the Dominican Republic. It is no breach of the treaty with the Dominican Republic that the United States shall accept the payment from another instead of the importer; from a nation instead of an individual; in an aggregate amount instead of on the several importations. By the treaty the Hawaiian Islands bought and specifically paid for the right to export to the United States sugar for the purpose of relieving those who carried the export from payment when the sugar was entered at the ports of the

United States. A fair interpretation of the Dominican treaty does not require that by virtue of the provisions of this ninth section sugar imported from that Republic shall have the benefit of the purchase made by the Hawaiian Islands without a payment of the price in consideration of which the benefit was granted to them.

II.

To correctly interpret a treaty, the situation of the parties to it at the time it was made, the subject-matter of the treaty, and the purposes and intentions of the parties must be considered. The Hawaiian Islands are comparatively small in area; located in a distant part of the Pacific Ocean, and, except with the United States, almost isolated from the commerce of the world. Their exports are few in number, and comparatively insignificant in amount. The purposes of the two treaties with the Dominican Republic and the Hawaiian Islands were different in a commercial view. The purpose of the Dominican treaty, as shown by its preamble is "to *augment* by all means at their disposal the commercial intercourse of their respective citizens." The preamble to the Hawaiian treaty is—

> The United States of America and His Majesty the King of the Hawaiian Islands, equally animated by the desire to strengthen and perpetuate the friendly relations which have heretofore uniformly existed between them, and to *consolidate* their commercial intercourse, have resolved to enter into a convention for commercial reciprocity.

The purpose of the former is to augment the commer-

cial intercourse of their respective citizens. The latter is to consolidate the commercial intercourse of the nations. The one is for the benefit of the citizens of the respective parties; the other is for the benefit of the nations, contracting in their national character. The one is to augment private commercial intercourse; the other is to consolidate the commerce of the nations. The severalty of the commerce of the nations is intended to be maintained by the one; the unification of the commerce of the nations is intended by the other.

The Hawaiian treaty was intended to be, and is, a substantial annexation or union of the two nations as one to the extent of the commercial limits of the treaty. It granted to the Hawiian Islands and the several States of the Union a qualified commercial union. This intent is emphasized by the provisions of the fourth article, by which special privileges are secured to the United States, and limitations of power are contracted to be placed on the Hawaiian Government in favor of the United States as to the disposal or control of the harbors, ports, and territories of the Hawiian Islands during the existence of the treaty. The commercial sovereignty and independence of the Hawaiian Islands, to the extent of the limits of the treaty, are substantially rendered subservient to the Government of the United States, in order that the commercial intercourse of the two nations may be consolidated. If the Hawaiian Islands were admitted to a full participation in the benefits of statehood in the Union, the Dominican Government might as well allege such a union gave full freedom of trade to her citizens, as that the consolidation in the commerce contemplated by the

Hawaiian treaty extended such a right, without a like consideration having been paid by that Republic.

III.

It is also to be borne in mind that above eleven years have transpired since the Hawaiian treaty was published, and the Dominican Republic, although her products have during all that time been charged with the duties now complained of, has never alleged a violation of her treaty rights; nor does it appear that any of *her citizens*, either in this case or heretofore, complained of wrong. The interpretation of an instrument placed upon it by the parties to it for a number of years is of cogent weight in determining the intent of the parties as understood at the time of its making. The fact that neither the Dominican Republic nor the United States have regarded the treaty with the Hawaiian Islands as applicable to the commerce of her citizens by whom sugar, the product of the Dominican Republic, has been imported, is such an interpretation by acquiescence by the parties to the contract as should be accepted as conclusive on the citizens of both nations.

IV.

If the view of the plaintiffs in error in these aspects of the case should be found to be correct, an inquiry still remains whether the ninth article of the Dominican treaty is self-executing, or whether it requires legislative action to give it effect. That legislation is necessary to give it effect is strongly supported by the reasoning of

Justice Marsnall in the case of *Foster* vs. *Neilson* (2 Peters, 314), as follows:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its operation is infraterritorial, but is carried into execution by the sovereign powers of the respective parties to the instrument.
>
> In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in the courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But, when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court.
>
> The article under consideration does not declare that all the grants made by His Catholic Majesty before the 24th of January, 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language it would have acted directly on the subject, and would have repealed those acts of Congress which were repugnant to it; but its language is that those grants *shall be* ratified and confirmed to the persons in possession, etc. By whom shall they be ratified and confirmed? This seems to be the language of contract, and if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed the court is not at liberty to disregard existing laws on the subject.

The language of the Dominican treaty is:

> No higher or other duty *shall be* imposed * * * than are or shall be payable on the like articles, the growth, produce or manufacture of any other foreign country.

This is a promise in the future as to what shall be done or shall not be done. It is a mere contract as to the future passage of customs laws, by which future legislation should be molded. How that legislation should be made to conform to this contract is a subject for legislative action. It could not have been intended that the power of Congress over the customs laws should be either yielded up to the Dominican Republic, or transferred from the legislature to collectors of customs or to the courts. That the Hawaiian Islands paid a valuable consideration for the admission of sugar, is not susceptible of substantial dispute. That the consideration thus paid is payable in the aggregate by a nation, and is not a moneyed consideration determinable by mere computation, precludes the possibility of adjustment by mere computation.

The treaty itself affords no rule by which to adjust. It could not have been contemplated that without rule the customs officers of the United States should adjust the amount to be paid upon the product of the Dominican Republic, as compared with that of the Hawaiian Islands, when the consideration was not the subject of mere computation. The courts are without adequate power to execute the contract. Hence, in the language of the case last cited, "the legislature must execute the contract before it can become a rule for the court."

The court in the case of Nethercliffe *vs.* Robertson (27 Fed. Rep., 741) referring to this treaty, after a full discussion of the subject, states the conclusion as follows:

> The action of Congress is necessary, and until such action is had, the courts must follow the law as it is found in the statute-books.

The court in the case of *Taylor* vs. *Morton* (2 Curtis, 462), in discussing a like provision, under like circumstances, in the treaty between the United States and Russia, concludes as follows:

> The truth is that this clause in the treaty is merely a contract addressing itself to the legislative power. The distinction between such treaties and those which operate as laws in courts of justice, is settled in our jurisprudence. * * * That it is applicable to a stipulation like that now in question is clear. The contract is to legislate in conformity to a rule therein given. This necessarily addresses itself exclusively to the legislative power. It is a rule for their action, and not of the action of courts of justice. They alone must determine which construction it shall receive, and what cases are or are not within it in point of fact, unless by law they refer these matters to the judicial department of the Government.

The same subject is further fully considered in the opinion of Judge Wallace in the case of *Bartram* vs. *Robertson* (15 Fed. Rep., 212).

## V.

The questions involved in this case are substantially disposed of in favor of the defendants in error by the opinion of this court rendered by Justice Field in the

case of *Bartram* vs. *Robertson* (122 U. S. R., 120) as follows:

> That the act of Congress as amended, authorized and requited the duties imposed upon the goods in question, if not controlled by the treaty with Denmark, after the ratification of the treaty with the Hawaiian Islands, there can be no question. And it did not lie with the officers of customs to refuse to follow its directions because of the stipulations of the treaty with Denmark. Those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the King of Denmark, to each other, that in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges.
>
> The stipulations were mutual, for reciprocal advantages. "No higher or other duties" were to be imposed by either upon the goods specified; but if any particular favor should be granted by either to other countries in respect to commerce or navigation, the concession was to become common to the other party upon like consideration; that is, it was to be enjoyed freely if the concession were freely made, or on allowing the same compensation if the concession were conditional.

The Hawaiian treaty has received a political interpretation by the action of the Government of the Hawaiian Islands, in accordance with the view we now ask the court to take. It is stated in the brief of the plaintiff in error, pages 72 and 73, as follows:

> One further illustration: Prior to the treaty of 1875 between the United States and Hawaii there existed a treaty between Hawaii and Great Britain, which contained the two provisions that are distinguished from each other in an earlier part of this argument, namely, a provision under article 3, corresponding to the general favored-nation clause hereinbefore quoted, and a provision in articles 4 and 5 that no other or higher duty should be payable on articles from Great Britain than were paid on the same article the growth of any other country. In 1878 Great Britain claimed in Hawaii the same treatment for its goods as was "accorded to similar goods of American origin." The Hawaiian authorities, through Mr. Carter, interpreted these clauses as not applying, except on the same compensations as had been stipulated for in the treaty between Hawaii and the United States. Great Britain would not accede to any such doctrine, and has never yielded, although by a rearrangement of the Hawaiian tariff, with the expressed approval of England after negotiation, the differences were composed.

The Empire of Germany, with a similar provision in its favor, joined in the claim of Great Britain to equal rights with the United States. The result of the negotiations between the powers establishes that the interpretation claimed by the Hawaiian Islands was adhered to, as

is shown by the following statement, found on page 74 of plaintiff's brief:

> It was during this controversy that the Hawaiian Government gave formal notice of the determination of Article 4 of its treaty with England, and a serious political difference resulted in Hawaiian politics, one party favoring the English demands and the other regretfully conceding the cogency of arguments to support them.
>
> The embarrassments of the Hawaiian Government were at the same time further increased by a similar demand made by the German Empire by reason of its treaties with Hawaii. The commission to London was extended to Germany. With that Government no composition seems to have been possible except by a thorough revision of the treaty relations between the two countries. A new treaty was, therefore, made with the German Empire, in which, to prevent the possibility in the future of the claim otherwise unavoidable, it was stipulated:
>
> "Certain relations of proximity and other considerations having rendered it important to the Hawaiian Government to enter into a new agreement with the Government of the United States of America by a convention concluded at Washington January 30th, 1875, the two high contracting parties have agreed that the special advantages granted by said convention to the United States of America in consideration of equivalent advantages shall not in any case be invoked in favor of the relations sanctioned between the two high contracting parties by the present treaty.

"This stipulation was incorporated in the new treaty of September 19, 1879, between Hawaii and the German Empire."

The Department of State of the United States in an analogous case determined that, without the payment of a like consideration, the treaty was not self-executing. Vide brief of plaintiff, pages 69 and 70, in which the ultimate action of the Department of State is stated on page 70, as follows:

> After a mature consideration of the whole question he (the Secretary of State) was prepared to admit the claim, assuming that United States vessels will receive similar exemptions in Sweden and Norway that the vessels of the latter did in the United States.

G. A. JENKS,
*Solicitor-General.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1887.

*No. 1012.*

HUGH KELLY, Plaintiff in Error,

vs.

EDWARD L. HEDDEN, Collector, &c.,
Defendant in Error.

*No. 108.*

JAMES F. WHITNEY, HENRY BUSCHMANN,
and CHARLES S. WHITNEY,
Plaintiffs in Error,

vs.

WILLIAM H. ROBERTSON, Collector, &c.,
Defendant in Error.

## REPLY BRIEF FOR PLAINTIFFS IN ERROR.

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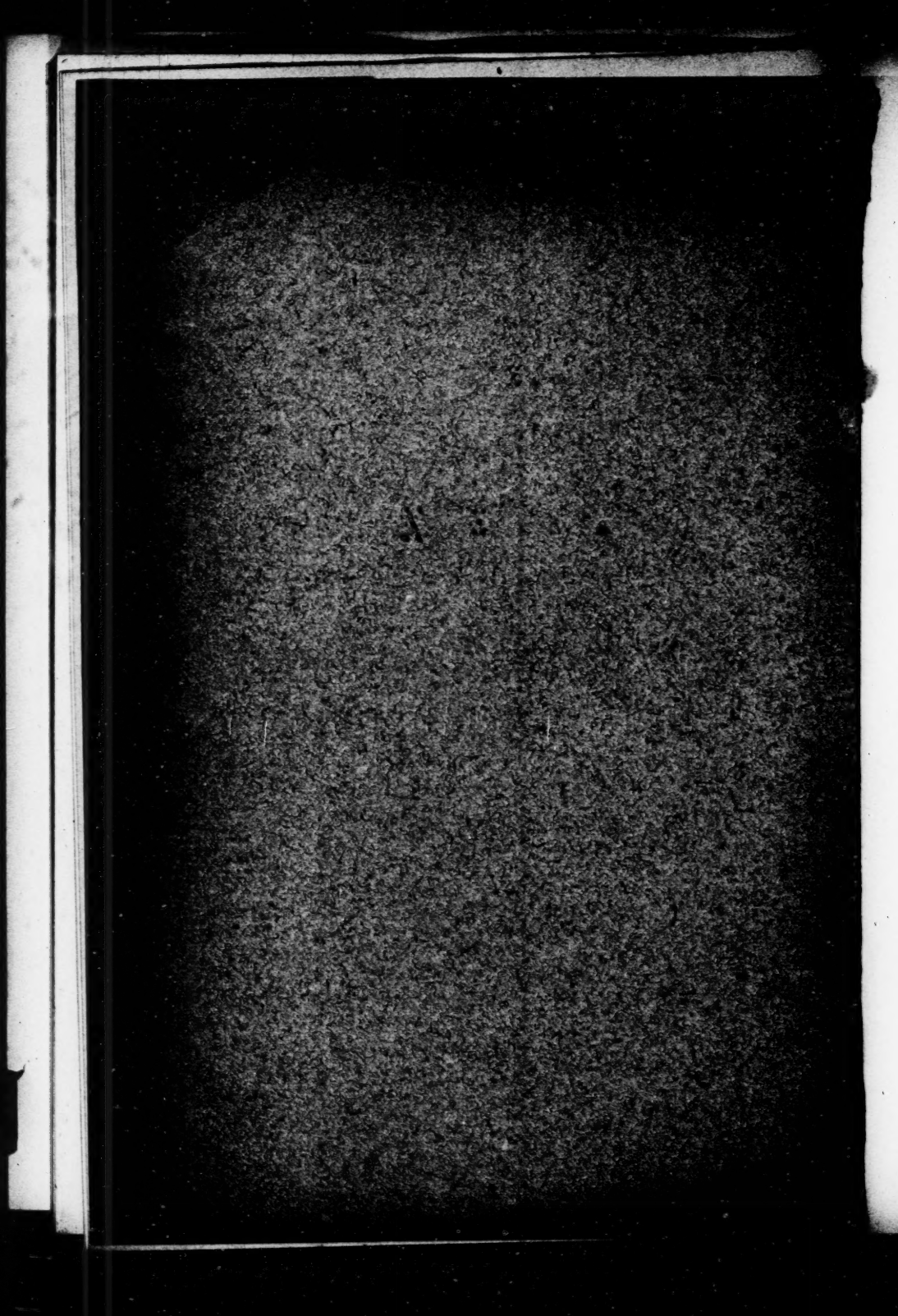

# Supreme Court of the United States.

**OCTOBER TERM, 1887.**

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*No. 1012.*

HUGH KELLY, PLAINTIFF IN ERROR,

*vs.*

EDWARD L. HEDDEN, COLLECTOR, &c., DEFENDANT IN ERROR.

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*No. 108.*

JAMES F. WHITNEY, HENRY BUSCHMANN, AND CHARLES S. WHITNEY, PLAINTIFFS IN ERROR,

*vs.*

WILLIAM H. ROBERTSON, COLLECTOR, DEFENDANT IN ERROR.

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## REPLY BRIEF FOR PLAINTIFFS IN ERROR.

The contentions argued by the learned Solicitor General in the five points covered by his printed brief have been anticipated and answered in the briefs and arguments already filed for plaintiffs in error. In direct response to each point as offered by the Government the following additional observations suggest themselves:

The argument of the learned Solicitor General contained in his brief, to effect the result claimed by him in the cases at bar, must necessarily go to the following extent, to wit: That in concluding the Dominican treaty in 1867 the United States reserved the right to make treaties with other powers in which privileges should be granted in the nature of exemptions from impost duties upon special compensations.

Such a reservation is not found expressed in the ninth article, and therefore, if it exists, must be derived by implication; nor is there any other article of the treaty containing any such expression.

If, in a treaty containing language such as that comprised in the ninth article of the Dominican treaty, another clause be discovered which provides for equalization between the parties of privileges granted upon concessions or conditions, and, if the presence of such a clause can fairly be regarded as creating this express reservation, surely the *absence* of such a clause (not present in the Dominican treaty) must lead to the necessary conclusion that there is the absence of such intention.

ACCORDING TO THE HABITUAL METHOD PURSUED BY THE UNITED STATES IN INTERNATIONAL INTERCOURSE AND BY THE POWERS TREATING WITH HER, ALL EXCEPTIONS TO GENERAL PROVISIONS EQUALIZING THE CONDITIONS OF COMMERCE AND NAVIGATION ARE REQUIRED TO BE EXPRESSLY NAMED.

Illustrations are afforded:

(1.) By those exceptions expressed in numerous treaties relating to commerce and navigation whereby the parties reserve their coastwise trade from the operation of treaty provisions otherwise broad enough to include it.

*a.* Of this the Dominican treaty in the present case furnishes a striking instance in its articles VI and VII.

Thus article 6, which equalizes the conditions of navigation between the vessels of the two countries and imports and exports in such vessels, is expressly made subject to the following exception in article VII:

"The preceding article is not applicable to the coasting trade of the contracting parties, which is, respectively, reserved by each exclusively for its own citizens. But vessels of either country shall be allowed to discharge a part of their cargoes at one port and proceed to any other port or ports of the territories of the other to discharge the remainder without paying higher or other port charges or tonnage dues than would be paid by national vessels in such cases, so long as this liberty shall be conceded to *any* foreign vessels by the laws of both countries."

*b.* An exception of this character runs through so many of the United States treaties that further special reference thereto would prove tedious.

The exception is sometimes as brief and unqualified, as follows:

Article VII, Austria treaty, 1829: "It is expressly understood and agreed that the coastwise navigation of both the contracting parties is altogether excepted from the operation of this treaty and of every article thereof."

This language is repeated in many treaties.

(2.) By special exceptions to other general provisions, instanced in the following treaties:

Treaty with Belgium, 1858, after providing by its eighth article for no discriminations in premiums, drawbacks, etc., on imports and exports in national vessels, makes a *special exception* thereto in its ninth article as to *salt* and the *produce of the national fisheries*, stating that—

"Each of the two parties reserving to itself the faculty of granting special privileges for the importation of those articles under its own flag."

Treaty with Belgium, 1845, in its eighth article:

There, in providing generally for equalizations of imports as to *all countries*, the article expressly reserves the right to discriminate in favor of a particular country; so that either party may take out of the scheme of equalization any particular country and make discriminations in favor of such country. [*This is authority for doing by special stipulation that which the Government now claims to do under general treaty clauses of the same nature and where no such reservation has been stipulated. Thus, if a Belgian ship should import molasses from Hawaii to the United States, according to the terms of that treaty it would not be entitled, under the reservation, to enter it upon the terms as to duty conceded to the Hawaiian government.*] But for this reservation or exception such discrimination would not have been possible under the treaty. This necessitated an express exception, so that under the reservations of the article the faculty is retained by either party to make indefinite discriminations or special arrangements. Such an exception could not be supplied by any justifiable intendment. *A similar exception to the treaty clause now in controversy would be an equally unjustifiable intendment.*

Treaty with Bolivia, 1858:

"ARTICLE II. If either party shall hereafter grant to any other nation, its citizens or subjects, any particular favor in navigation or commerce it shall immediately become common to the other party, freely when freely granted to such other nation, or on yielding the same compensation when the grant is conditional.

"*Explanation.*—As in said article it is stipulated that any special favor in navigation and trade granted by one of the contracting parties to any other nation extends and is common to the other party forthwith, it is declared that in what pertains to the navigation of rivers this treaty shall only apply to concessions which the Government may authorize for navigating fluvial streams which do not present obstructions—that is to say, those whose navigation may be naturally plain and current without there having been need to obtain it by the employment of labor and capital; that by

consequence there remains reserved the right of the Bolivian government to grant privileges to any association or company, as well foreign as national, which should undertake the navigation of those rivers, from which, in order to succeed, there are difficulties to overcome, such as the clearing out of rapids," etc., etc.

*This reservation implies that but for its existence the navigation of streams rendered navigable by works of art, and the navigation of which is subject to the payment of tolls, would have been opened under the above-quoted general clause to freedom of navigation on the part of the contracting parties.*

Treaty with Brazil, 1828:

"ARTICLE II. The parties * * * engage mutually not to grant any particular favor to other nations in respect of commerce and navigation which shall not immediately become common to the other party, who shall enjoy the same freely if the concession was freely made, or on allowing the same compensation if the concession was conditional. *It is understood, however, that the relations and conventions which now exist or may hereafter exist between Brazil and Portugal* SHALL FORM AN EXCEPTION *to this article.*"

Treaty with Denmark, 1826:

"ARTICLE V. Neither the vessels of the United States nor their cargoes shall, when they pass the Sound or the Belts, pay higher or other duties than those which are or may be paid by the most favored nation.

"ARTICLE IV. The *present convention shall not apply to the northern possessions of His Majesty* the King of Denmark—that is to say, Iceland, the Faroe Islands, and Greenland—*nor to places situated beyond* the Cape of Good Hope, the *right to regulate* the direct intercourse with which possessions and places *is reserved* by the parties, respectively; and it is further agreed that this *convention is not to extend to the direct trade between Denmark and the West India colonies* of his Danish majesty, but in the intercourse with those colonies it is agreed that whatever can be lawfully imported into or exported from the said colonies in vessels of one party from or to the ports

of the United States or from or to the ports of any other foreign country may in like manner and with the same duties and charges applicable to vessel and cargo be imported into or exported from the said colonies in vessels of the other party."

Treaty with Chili, 1832, article II. The parties engage mutually not to grant particular favors which shall not become common on same conditions (in language same as above-quoted treaty with Brazil) and then stipulate:

"It is understood, however, that the relations and convention which now exist or may hereafter exist between the Republic of Chili and the Republic of Bolivia, the Federation of the Centre of America, the Republic of Colombia, the United States of Mexico, the Republic of Peru, or the United Provinces of the Rio de la Plata SHALL FORM EXCEPTIONS *to this article.*"

Treaty with Ecuador, 1839, article III., after providing for mutual benefits in trade and residence to be equally enjoyed, proceeds:

"But it is understood that this article does not include the coasting trade of either country, the regulation of which is *reserved* by the parties, respectively, according to their own separate laws; and it is further agreed that this article shall be subject to the following modification: That whereas, by a law of Ecuador of March 21st, 1837, vessels built in the dock-yard of Guayaquil shall be exempted from various charges, therefore vessels of the United States cannot claim this privilege, but shall enjoy it if it should be granted to vessels belonging to Spain or to Mexico and to the other Hispano-American Republics."

This reservation implies that the terms of the general clause unrestricted by express reservations would not only include special privileges conferred upon *nations*, but special privileges conferred upon *individuals*.

France, 1800, article XI, in providing for equalization of imports, expressly limits the application of this rule to the "territories of the French Republic in Europe."

Great Britain, 1815, article II, after providing for an equality of duties on productions of each country and on drawbacks on re-exportation, proceeds with the following exception:

"The intercourse between the United States and His Britannic Majesty's possessions in the West Indies and on the Continent of North America shall not be affected by any of the provisions of this article, but each party shall remain in the complete possession of its rights with respect to such an intercourse."

Treaty with Netherlands, 1852, articles I, II, and III, provided for reciprocal equalities of navigation and of imposts. These would have applied without reservation to all trade, including the coastwise trade, were it not for the special exceptions in article V, which permitted certain discriminations, and in article IV, which excepted from the operation of the "present arrangement the coasting trade and fisheries of the two countries, respectively."

Treaty with Portugal, 1840, article III, provides for no higher or other duties on importations of products of Portugal and *its possessions* than are or shall be payable on the like products "of any other foreign country," and the article in other respects corresponds in terms with the ninth article of the Dominican treaty. At the end of the article, however, is a proviso reserving from its operation a stipulation between the United States and France "for a special equivalant in regard to French wines," dated July 4, 1831, which stipulation was to expire and "to cease to have effect" February, 1842.

THUS IS EVIDENCED THE DIPLOMATIC NECESSITY OF EXPRESSING AN EXCEPTION "FOR A SPECIAL EQUIVALENT," WITHOUT WHICH EXPRESSED EXCEPTION THE IDENTICAL

PROVISION NOW BEFORE THE COURT WAS DEEMED SO COMPREHENSIVE AND OPERATIVE AS TO INCLUDE A CASE WHERE THERE WERE SPECIAL EQUIVALENTS.

If it were proper to raise by implication the right to discriminate against the principles of equalization propounded by such language as that of the ninth article of the Dominican treaty, it would be necessary to supply words of this import, to wit, after words—

"No higher or other duty *shall be* imposed * * * than are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country," to append words, EXCEPT COUNTRIES WHICH SHALL ENJOY TREATY EXEMPTIONS BY SPECIAL ARRANGMENTS.

It is respectfully insisted that no such exception can be supplied by intendment.

The strength of any effort to draw such an implication must rest upon the assumption that, agreeable to the diplomatic policy of the Government current in 1867, the United States did not then intend to part with the right consistent with the treaty to allow exemptions in impost duties as the means of acquiring for herself commercial and other advantages.

Against such an assumption is the language of the treaty itself, which in terms parts with such a right, and the unvarying language of the diplomatic history of the country from the first year of its sovereign existence.

This is not an instance where something has been incidentally drawn within the language of the treaty that is not included within its object, but, on the contrary, it is a proposed limitation of the declared object of the treaty itself. That object, as declared, is *un*limited equalization; the effect of allowing the words sought to be interpolated would be to reduce it to a *limited* equalization. This cannot be done consistently with any rule of interpretation or construction.

## I.

The argument of the Solicitor General in point 1 of his brief is to the effect that the Hawaiian treaty provides for the payment of duties to the United States upon the articles embraced in that treaty to be imported into the United States by the Hawaiian government instead of by the importer, and that presumptively the amount of the duties so paid is the same as that paid on such articles imported from San Domingo; because if not the same the Dominican treaty providing for "no higher or other duties" would be violated, and such violation is not to be presumed.

Of course, this construction of the Solicitor General concedes the construction of the ninth article of the Dominican treaty to be that urged by plaintiffs in error, but we most emphatically demur to and dissent from the construction he seeks to put upon the Hawaiian treaty, to wit, that it amounts to the *payment* by the Hawaiian government of "an aggregate amount," instead of duties to be paid "on the several importations" by the importer when the importations are made.

If treaties were to be construed in this way all treaties containing any reciprocal stipulations as to imposts would of themselves effect a payment of duties on the basis of the ordinary tariff, and thus produce uniformity and equality of duties, and this would result in the nullification of all such clauses as the ninth article of the Dominican treaty in all previous treaties. Is not such a construction a pitiful evasion that would not be tolerated in diplomatic intercourse, and, furthermore, unworthy the dignity of a nation?

Again, such a construction of the Hawaiian treaty does violence to the language used in the treaty and the act of Congress adopting it, * * * the former of which says that the scheduled articles—molasses and tallow, etc.—are agreed to be admitted "into all the ports of the United States *free of duty*," and the latter of which provides that after a

designated date * * * "molasses and tallow shall be introduced into the United States *free of duty* so long as the said convention shall remain in force."

Such language cannot be made to imply an intention on the part of anybody to pay duties or the payment of duties by anybody.

## II.

The only observation suggested by the second point, additional to those by which it has been answered in plaintiffs' main briefs, arises out of Government's statement that Hawaii is extensively "substantially subservient to the United States" for commercial purposes like unto "statehood in the Union." Hence "full freedom of trade to her citizens," like interstate trade, is to furnish no event upon which the stipulated assimulation of duties provided for by the Dominican treaty shall depend. This is in effect an argument that the Dominican stipulation would not apply to a dependency of the United States, and reciprocally would give the United States no rights as to traffic with dependencies of the Dominican Republic. Such a result, of course, would depend on the language of the stipulations, as is shown by the fact that European governments have expressly excepted their colonies from the provisions of their commercial treaties if intended not to apply to such depencies. This view is further illustrated by the many exceptions stated in our own treaties uniformly reserving our coastwise trade from the provisions of treaties the terms of which would otherwise include it.

The ingenuity that suggests that Hawaii has been admitted into the Union because she sends free molasses to California evinces some desperation of argument.

III.

The suggestion contained in the third point of the brief, that the construction contended for by the defendant has been acquiesced in for eleven years, is without foundation. The cases at bar exhibit a five years' contest on importations covered by these cases. That the controversy antedated these cases is notorious.

It was active in the tariff discussions which resulted after several years in the enactment of March 3, 1883, when by section 11 treaty rights were reserved to be dealt with according to law.

As to acquiescence in the theory of the present defense there is no proof.

See the paragraphs on this subject at page 99 of main brief, *h*.

IV.

In answer to the contention contained in the fourth point, that the ninth article of the Dominican treaty is not self-executing, reference is hereby made to pages 10 and 11 and 106 to 109 of plaintiff's main brief.

Justice Miller has stated the test to be whether "the provisions" of the treaty "prescribe a rule by which the rights of the private citizen or subject may be determined" and judicially enforced. (*Edye* vs. *Robertson*, 112 *U. S. R.*, 598.)

The rule in this case is so simple as to be capable of immediate application by the customs officers, and certainly there is no difficulty in determining the rights of private citizens or subjects by it and in enforcing them.

Exactly such a rule was directly applied for purposes of the customs when the Secretary of the Treasury, in 1844, directed the enforcement of article 3 of the treaty with Portugal of 1840, which article corresponded in terms with the ninth article of the Dominican treaty.

It is not necessary for us to contend in this case that the provisions of a treaty, unaided by legislation, can authorize the collection of a rate or amount of duties imposed by such treaty, for that is not the case in the present instance. The true question is: *Can the provisions of a treaty taking effect under our Constitution as part of the municipal law inhibit and render illegal a claim to duties on the part of the Government inconsistent with its provisions?*

But, even if it were necessary for us to find authority for the levying of specific duties in accordance with the provisions of the treaty, we would find it in the act of 1883. That act, being intended to fix a standard of duties, can only be regarded as intending to introduce the provisions of the treaties referred to as means of fixing that standard in cases arising under them.

It affords, therefore, legislative authority for giving efficacy to any provisions of such a treaty as might require such an act to be performed. *In the present instance the treaty has declared that no duties shall be exacted when none are chargeable against any third power*, and the only efficacy needed for the full execution of its provisions is to render illegal the action of the collector imposing the duties of which complaint is made, and this was the clear object of section eleven of the act of 1883.

V.

Respecting the fifth point of the Government brief, see sixteenth point, page 85; also page 145 of the plaintiff's main brief. In the Bartram case a different condition of legislation and a different treaty was involved. The treaty provision upon which Mr. Justice Field based the opinion of the Court in that case is wanting in the cases now before the Court, and the discussion of that opinion in plaintiff's brief has fully distinguished that case from the present cases.

The defendant attempts to derive some support for his

positions in construing and applying article nine of the Dominican treaty from the course pursued by the Hawaiian government when called to account by Great Britain and Germany for her breach of treaty obligation towards them in refusing the British and German exportations to Hawaii the exemptions given to the United States by its treaty and the Hawaiian legislative enactment in pursuance thereof. Hawaii had previous treaty obligations with Great Britain and Germany corresponding in terms to the provisions of article IX of the Dominican treaty.

The argument of the learned Solicitor General upon these facts seems to be that because Hawaii disregarded her treaty obligation with Great Britain and Germany, therefore the United States should be guilty of a like breach of faith with the Dominican Republic. Such an argument is its own answer.

Moreover, if the learned Solicitor General had given *closer study to the plaintiffs' brief*, from which he so comfortably quotes, he would have discovered (page 72) that the Anglo-Hawaiian treaty there mentioned contained the general favored-nation community provision that particular favors should become common freely or upon like conditions—that is to say, language identical with that relied upon by Mr. Justice Field in the Bartram case, and which language is not found in any form in the Dominican treaty. Such a *provision* as was *in this Anglo-Hawaiian treaty* and was considered as potential in the Bartram case is absolutely *omitted in the Dominican* treaty, the terms of which are without qualification, and the instance, therefore, is without direct application to the case at bar. It was referred to in the brief as an instance of diplomatic differences pertinent to the history of the subject.

Thus the United States has not even the miserable precedent of an unsuccessful Hawaiian contention to sustain the present position of the learned Solicitor General, which is without any discoverable diplomatic authority.